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IN THE

Supreme Court of the United States

TERESA DAVIS, OSCAR HARRIS, HELEN DIRKANS, ELVIS FOSTER, RICHARD STREJC, AND BRENDA STREJC (EVERGREEN TERRACE TENANTS),

Petitioners,

v.

CITY OF JOLIET, ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under the Supremacy Clause of the United States Constitution (U.S. Const. Art. VI Cl. 2), the City of Joliet may condemn certain federally subsidized, low-income, multifamily housing, when federal law explicitly requires the property to be maintained for at least 30 years as housing for low-income families.

PARTIES TO THE PROCEEDING

Petitioners are Teresa Davis, Helen Dirkans, Oscar Harris, Elvis Foster, Richard Strejc and Brenda Strejc (Evergreen Terrace Tenants). Respondent is the City of Joliet, Illinois (Plaintiff-Appellee in the underlying proceeding). The United States Department of Housing and Urban Development is a Defendant-Appellant in the underlying proceeding. New West, L.P., and New Bluff, L.P. are Defendants-Appellants in the underlying proceeding. These parties are also being served as Respondents.

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PETITION FOR WRIT OF CERTIORARI

Teresa Davis, Helen Dirkans, Oscar Harris, Elvis Foster, Richard Strejc and Brenda Strejc respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (Seventh Circuit) in this case. Appendix to Petition ("Pet. App.") 1a-18a.

OPINIONS BELOW

The Seventh Circuit order denying Petitions for Rehearing *En Banc* by the United States Department of Housing and Urban Development, New West and New Bluff, and Teresa Davis, Helen Dirkans, Oscar Harris, Elvis Foster, Richard Strejc and Brenda Strejc is not reported (Pet. App. 56a-57a). The opinion of the Seventh Circuit affirming the district court is reported as *City of Joliet v. New West, et al.*, 562 F.3d 830 (7th Cir. 2009) (Pet. App. 1a-18a). The Seventh Circuit order granting interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is not reported (Pet. App. 19a-22a). The District Court opinion and order granting the Petitions for Interlocutory Appeal is not reported (Pet. App. 23a-29a). The District Court opinion and order denying HUD's and New West's Motions for Summary Judgment are not reported. (Pet. App. 30a-40a). The District Court opinion and order granting Joliet's Motion for Judgment on the Pleadings and subsequent order denying reconsideration are not reported (Pet. App. 41a-55a).

JURISDICTION

The Seventh Circuit granted Petitions for Interlocutory Appeal pursuant to 28 U.S.C. § 1292(b) on July 16, 2008. Pet. App. 19a-22a. The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 9, 2009 and Petitions for Rehearing and Rehearing *En Banc* were denied on July 14, 2009. Pet. App. 1a-18a; 56a-57a. The jurisdiction of this court in invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Supremacy Clause*, U.S. Const. art. VI, cl. 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

Relevant provisions of the Multifamily Assisted Housing Reform and Affordability Act ("MAHRA"), Pub. L. No. 105-65, Title V, 111 Stat. 1384 (42 U.S.C. § 1437f note) are set forth in an appendix to this petition. Pet. App. 58a-113a.

STATEMENT OF THE CASE

The City of Joliet ("Joliet") is seeking to condemn Evergreen Terrace, a project-based Section 8[1] housing development in Joliet, Illinois. Evergreen Terrace has undergone financial restructuring under the Multifamily Assisted Housing Reform and Affordability Act ("MAHRA"), Pub. L. No. 105-65, Title V, 111 Stat. 1384 (42 U.S.C. § 1437f note), and is therefore subject to mortgages held by the United States Department of Housing and Urban Development ("HUD") and statutorily required use agreements maintaining the property as affordable rental housing for 30 years. Prior to the restructuring, Evergreen Terrace was subject to a HUD-insured mortgage under section 221 of the National Housing Act ("NHA"), 12 U.S.C. § 1715*l*.

Notwithstanding the HUD-held mortgages and statutorily required use agreements, the Seventh Circuit, on interlocutory appeal, affirmed the district court decision that the condemnation was not preempted by federal law. In doing so, the Seventh Circuit held that

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[1] The Section 8 program provides decent, affordable housing to low-income families. *See* 42 U.S.C. § 1437f (2006). Section 8 assistance programs are either project-based or tenant-based. Under the project-based programs, a subsidy for some or all of a property's units is provided under a contract, called a Housing Assistance Payments Contract ("HAP Contract") typically between HUD and the private owner of the property. Tenants pay 30% of their adjusted incomes as rent and HUD provides a subsidy to pay the difference between the tenant's payment and the owner's rent. 42 U.S.C. §§ 1437f(c)(3), 1437a(a)(1). The subsidy remains with the building when a tenant moves.

(a) federal law only preempts state law under the doctrine of implied conflict preemption if there is a federal preemptive regulation with the force of law, or the federal and state laws are in direct conflict, and (b) a federal law that makes initial participation in a federal program voluntary does not preempt state law. These holdings misapply the decisions of this Court and conflict with decisions of the Fifth and Ninth Circuits that have held that a state condemnation may be preempted by federal law when there is no express preemptive regulation, and decisions of the Eighth, Fifth, and Ninth Circuits, which recognize that the voluntary nature of federal programs is irrelevant for purposes of preemption.

Statutory and Regulatory Framework

In 1997, Congress enacted the Multifamily Assisted Housing Reform and Affordability Act ("MAHRA"), Pub. L. No. 105-65, Title V, 111 Stat. 1384 (42 U.S.C. § 1437f note), "to preserve low-income rental housing affordability and availability while reducing the long-term costs of [federal] project-based assistance." *Id.* § 511(b)(1). MAHRA also was meant "to encourage owners of eligible multifamily housing projects to restructure their FHA-insured mortgages"; "to resolve the problems affecting financially and physically troubled federally insured and assisted multifamily housing projects through cooperation with residents, owners, State and local governments, and other interested entities"; and "to protect the interest of project owners and managers, because they are partners of the Federal Government in meeting the affordable housing needs of the Nation." MAHRA §§ 511(b)(3),(6),(7).

MAHRA creates a complex scheme under which owners of certain federally subsidized low-income housing developments may restructure the financing of those developments through the Mark-to-Market ("M2M") Program. Under the M2M Program, above-market Section 8 rents for multifamily housing are reduced to comparable market rents. At the same time, HUD-insured and HUD-held financing is restructured so that the mortgagor's monthly payments can be paid from the reduced rental income. MAHRA restructuring also facilitates the rehabilitation of the multifamily housing development, ensures competent management of the properties, and extends the life of the development as affordable housing for low-income families. *See* MAHRA Interim Rule, 63 Fed. Reg. 48,926, 48,926 (Sept. 11, 1998).

HUD administers the M2M program through public agencies, nonprofit organizations, or other entities that it selects based on statutory criteria, called Participating Administrative Entities ("PAEs"). *See* MAHRA, §§ 512(10) (defining PAE), 513(b) (selection criteria). PAEs negotiate with owners and develop a Mortgage Restructuring and Rental Sufficiency Plan ("Restructuring Plan") according to "such terms and conditions as [HUD] shall require." *Id.* § 514(a)(2).

The M2M program carves out a specific role for local governments in the development of the Restructuring Plan: local governments and other interested parties are consulted regarding the plan and are provided the opportunity to comment. MAHRA §§ 511(b)(6) and 514(f)(1),(2); 24 C.F.R. § 401.500 (2008).

A final HUD-approved M2M Restructuring Plan must satisfy numerous requirements. For example, the Plan must restructure the assisted rents and provide for future rent adjustments under HUD guidelines. *Id.* §§ 514(e)(1), (2); *see also Id.* § 514(g). Likewise, the Plan must require the owner to evaluate the property's rehabilitation needs and to take whatever action may be necessary to maintain the project "in decent and safe condition," per standards set by HUD or local housing codes. *Id.* §§ 514(e)(3), (5).

In furtherance of MAHRA's objective to preserve the low-income housing affordability and availability, section 514(e)(6), provides that the Restructuring Plan "shall * * * require the owner or purchaser of the project to maintain affordability and use restrictions in accordance with regulations promulgated by [HUD] for a term of not less than 30 years." *Id.* § 514(e)(6). These restrictions "shall be * * * contained in a legally enforceable document recorded in the appropriate records" and shall be "consistent with the long-term physical and financial viability and character of the project as affordable housing." *Id.* § 514(e)(6)(A), (B). Nothing in MAHRA or its implementing regulations allows the owner to end their obligations under the use agreements prior to the expiration of the 30-year term.

MAHRA also authorizes HUD to become the holder of a restructured mortgage through payment of a non-default claim under the prior mortgage insurance contract. *Id.* § 523(b) (codified at 12 U.S.C. § 1735f-19(b)). Finally, Congress has authorized HUD to issue regulations that implement MAHRA. *Id.* § 522(a). Those regulations are codified in 24 C.F.R. pts. 401 and 402. *See* 65 Fed. Reg. 15,452.

A backdrop of M2M restructuring, Section 221 of the National Housing Act (NHA), 12 U.S.C. § 1715*l*, is a mortgage insurance program administered by HUD "designed to assist private industry in providing housing for low and moderate income families and displaced families." 12 U.S.C. § 1715*l*(a) (2006). Participants in the section 221 program are typically subject to a contract, or "regulatory agreement" with HUD in order to effectuate HUD-established restrictions on the subject property. *See* 12 U.S.C. § 1715*l*(d)(3). Such a contract, or "Regulatory Agreement," typically incorporates by reference any HAP contract (*see supra* n. 1) to provide project-based Section 8 rental assistance at the development. *See e.g.*, 12 U.S.C. § 1715*l*(f). Such Regulatory Agreements remain in effect so long as HUD insures or holds the mortgage. *See* 24 C.F.R. § 200.105(a) (2008); *see also* 12 U.S.C. § 1713(b)(2) (2006).

Background

Evergreen Terrace is a 356-unit housing complex comprised of two low-income multifamily housing developments, known as Evergreen Terrace I ("ET I") and Evergreen Terrace II ("ET II") in Joliet, Illinois. During the early 1980s, HUD acquired both Evergreen Terrace properties through foreclosure on earlier section 221 loans and sold them to their current owner for $1 each. *See* Contracts for Sale and Purchase, Joint Appendix[2] (JA) at 265-281. As per the sales contracts,

[2] Citations herein, other than to the Appendix filed with this petition, are to record documents contained in the Joint Appendix (JA) filed by the appellants in the Seventh Circuit.

New West and New Bluff ("the Owners"),[3] owners of Evergreen Terrace I and II respectively, took out long-term mortgages on the developments and used the proceeds to rehabilitate Evergreen Terrace. *See* 1981 ET I Mortgage at ¶ 16, JA 284; and 1982 ET II Mortgage at ¶ 16, JA 290. These mortgages were insured by HUD under section 221 of the NHA, 12 U.S.C. § 1715*l*, and the development became subject to 20-year HAP contracts to provide project-based Section 8 rental assistance. *See* Herb Halperin Affidavit ¶¶ 14, 17, 18, JA 109-11.

1. ***The Evergreen Terrace Restructuring.***

Beginning in 2001, when the HAP contracts for Evergreen Terrace were nearing expiration, the Owners applied for financial restructuring under the M2M program. *See* Herb Halperin Affidavit ¶ 21, JA 106. HUD selected the Illinois Housing Development Authority ("IHDA") as PAE for the development and negotiation of the M2M Restructuring Plan. *See* Harry West Affidavit ¶ 4, JA 100. IHDA determined that there was a "critical need to preserve" Evergreen Terrace. *Id.* Accordingly, as early as May 2003 HUD offered its initial approval for an Evergreen Terrace I Restructuring Plan, signaling its intent to preserve Evergreen Terrace I as a project-based Section 8 development under MAHRA. *See* Herb Halperin Affidavit ¶ 22, JA 111. After the City of Joliet contested

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[3] Evergreen Terrace is owned by Illinois land trusts of which defendants New West and New Bluff, Illinois limited partnerships, are the primary beneficiaries. *See* Herb Halperin Affidavit at ¶ 3, JA 106.

IHDA's findings, however, HUD appointed Heskin Signet Partners as PAE to replace IHDA, and final approval of the restructuring was delayed until 2006. *See* Harry West Affidavit ¶¶ 4, 7-9, JA 100-02; Herb Halperin Affidavit ¶ 22, JA 111.

HUD approved a final Restructuring Plan for Evergreen Terrace in September 2006 based on two PAE analyses, and after significant consultation with City officials and the Owners. *See* Harry West Affidavit ¶¶ 7, 8, JA 100-02. HUD then paid off the original mortgages that it had insured and executed new mortgages with the Owners in November 2006. *See* 2006 ET I Mortgage Restructuring Mortgage, JA 114-27; 2006 ET II Mortgage Restructuring Mortgage, JA 128-141.

Pursuant to section 514(e)(6) of MAHRA, 30-year Use Agreements also were executed in November 2006, requiring that during the 30-year term, Evergreen Terrace "shall be used solely as rental housing with no reduction in the number of residential units unless approved in writing by HUD," and that a certain percentage of the units be occupied by low-income tenants financially eligible for the project-based Section 8 program. *See* Evergreen Terrace I and II Use Agreements, ¶¶ 4, 5, JA 144, 163. Accordingly, the Owners entered into new 20-year HAP contracts to provide project-based Section 8 rent subsidies for Evergreen Terrace. *See* 2006 ET I and ET II HAP contracts, JA 232-64. HUD and the Owners also entered into new Regulatory Agreements preserving HUD's ability to control and monitor the improvement,

maintenance, and operation of Evergreen Terrace. *See* 2006 ET I Regulatory Agreement, JA 180-207; 2006 ET II Regulatory Agreement, JA 208-231.

Finally, substantial escrow funds for the immediate repair, rehabilitation, and long-term maintenance of Evergreen Terrace were established as a part of the final restructuring. *See* Harry West Affidavit ¶¶ 9, 10, JA 102-03.

2. ***The Evergreen Terrace Lawsuits.***

In March 2005, prior to the completion of the MAHRA restructuring and before Joliet filed this eminent domain action, the Owners filed a civil rights lawsuit against Joliet in federal court alleging, among other things, that the Joliet's actions in opposing the MAHRA restructuring violate the Fair Housing Act. *See New West v. City of Joliet*, No. 05 C 1743 (N.D. Ill., filed Mar. 24, 2005).

Several months after the Owners filed suit, the Joliet City Council declared Evergreen Terrace a public nuisance and blighted area. *See* Resolution 5655 (August 17, 2005), JA 312-14. On October 4, 2005, the Joliet City Council passed Ordinance No. 15298, directing corporation counsel to initiate eminent domain proceeding to take Evergreen Terrace. *See* Ordinance 15298 (October 4, 2005), JA 315-21. Shortly thereafter, Joliet filed this condemnation action seeking to take Evergreen Terrace by eminent domain. *See* Notice of Removal, JA 61-79.

The condemnation complaint was originally filed in state court and named the Government National Mortgage Association ("GNMA"), as well as the Owners, as defendants. *See* Notice of Removal, JA 61-79. No tenants were named in the condemnation complaint. GNMA removed this matter to federal court in November 2005 pursuant to 28 U.S.C. §§ 1442(a) and 1444. *Id.* After removal, the condemnation lawsuit was reassigned to the judge presiding over the Owners' civil rights lawsuit. In February 2006, GNMA was dismissed as a defendant in the condemnation and HUD was joined as a necessary party. *See* February 27, 2006 District Court Order Dismissing GNMA, JA 80; March 9, 2006 District Court Order Joining HUD as Defendant, JA 81; Joliet's Amended Complaint, JA 83-98.

In September 2006, the district court dismissed the Owners' civil rights lawsuit on jurisdictional and other grounds. *See New West v. City of Joliet*, 491 F.3d 717, 719 (7th Cir. 2007). The Owners appealed, and Seventh Circuit reversed and remanded. *Id.* at 722. Nonetheless, the panel suggested, in *dictum*, that "it is hard to see any obstacle [to the condemnation] in federal law," citing the United States Housing Act, 42 U.S.C. 1437f and the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, but not the NHA or MAHRA. *Id.* at 721. The Seventh Circuit instructed the district court that its "first order of business" on remand should be to resolve the condemnation suit. *Id.*

3. *Motions for Judgment on the Pleadings and Summary Judgment.*

Immediately following the Seventh Circuit ruling in the civil rights lawsuit, Joliet moved for, and was granted, judgment on the pleadings with respect to HUD's and the Owners' affirmative defenses relating to federal preemption of the condemnation under the *Supremacy Clause*. Pet. App. 43a-55a. HUD's and the Owners' subsequent motions to reconsider were also denied. Pet. App. 41a-42a. In addition, HUD and the Owners filed motions for summary judgment arguing that the condemnation is preempted by federal law and prohibited under the *Property Clause* (U.S. CONST. art. IV, Sect. 3, cl 2) the *Contracts Clause* (U.S. CONST. art. I, § 10), and the doctrine of intergovernmental immunity. The district court also denied these motions. Pet. App. 30a-40a.

4. *The Tenants Intervene in the Condemnation.*

In early 2008, after the motions for judgment on the pleadings and summary judgment had been fully briefed, residents of Evergreen Terrace Teresa Davis, Oscar Harris, Helen Dirkans, Elvis Foster, Richard Strejc and Brenda Strejc, (the Tenants) were granted leave to intervene in the condemnation action. JA 323-24. The Tenants' Answer also raises affirmative defenses that the condemnation was preempted by federal law and barred under the *Property Clause*, *Contracts Clause*, and the doctrine of Intergovernmental Immunity. At about the same time, the Tenants filed a fair housing lawsuit against the City of Joliet. *See Davis et al. v. City of Joliet*, No. 07 C 7214 (N.D. Ill. filed Dec. 21, 2007).

5. ***Petitions for Interlocutory Appeal.***

Shortly after the district court issued its orders granting judgment on the pleadings, denying reconsideration, and denying summary judgment, HUD and the Owners filed timely petitions requesting the district court to certify these orders for interlocutory appeal.[4] On June 13, 2008, the district court granted these petitions. Pet. App. 23a-29a.

Subsequently, HUD and the Owners filed timely Petitions for Interlocutory Appeal with the Seventh Circuit, which were granted pursuant to 28 U.S.C. § 1292(b) on July 16, 2008. Pet. App. 19a-22a. In addition to any other argument the appellants sought to raise, the Seventh Circuit specifically asked the parties to address the question "whether a contract between a private developer and a federal agency can curtail a government's power of condemnation." *Id.* The Tenants, parties in the proceeding below, were allowed to participate in the Seventh Circuit appeal as appellants.

6. ***Proceedings at the Seventh Circuit.***

The Seventh Circuit heard arguments in this matter on January 12, 2009 and issued its opinion on April 9, 2009. Pet. App. 1a-18a. The Seventh Circuit affirmed the district court's rulings on the issues of preemption, the *Property Clause*, the *Contracts Clause*, and

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[4] HUD only sought certification for interlocutory appeal on the district court's decisions about preemption; the Owners also sought certification regarding the *Property Clause*, *Contracts Clause*, and Intergovernmental Immunity decisions.

Intergovernmental Immunity. The Seventh Circuit held that (a) federal law only preempts state law under the doctrine of implied conflict preemption if there is a federal preemptive regulation with the force of law, or the federal and state laws are in direct conflict, and (b) a federal law that makes initial participation voluntary does not preempt state law. Pet. App. 8a – 11a.

HUD, the Owners, and the Tenants each filed Petitions for Rehearing and Rehearing *En Banc*, which were denied on July 14, 2009. Pet. App. 56a-57a. This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

This case presents an exceptionally important question of federal law that has not been but should be settled by this Court, and on which the circuits are in conflict: Does the Supremacy Clause prohibit a local government from condemning federally subsidized low-income housing when federal law expressly requires that housing to be maintained as low-income housing for the next 30 years? The answer to that question is of paramount importance to the future of federal housing programs and the power of eminent domain in this country.

I. THE QUESTION WHETHER, UNDER THE SUPREMACY CLAUSE, A FEDERAL HOUSING PRESERVATION LAW CONFLICTS WITH AND IMPLIEDLY PREEMPTS A LOCAL CONDEMNATION ORDINANCE IS AN IMPORTANT QUESTION WARRANTING REVIEW BY THIS COURT.

The undoubted legal and practical importance of this question, both to conflict preemption jurisprudence and the federal housing laws aimed at preserving affordable housing for this nation's low-income households, warrants review by this Court. The Seventh Circuit's decision here in favor of the local condemnation ordinance diverges markedly on two key preemption principals from the sound decisions of sister circuits and this Court.

First, the Seventh Circuit concluded that the City of Joliet's attempt to acquire the low-income housing development of Evergreen Terrace by eminent domain was not barred by the Supremacy Clause of the U.S. Constitution because HUD had not issued "a preemptive regulation with the force of law." *City of Joliet v. New West*, 562 F.3d 830, 835 (7th Cir. 2009). As is described in greater detail below, it did so even though the federal law, MAHRA, expressly requires the housing at Evergreen Terrace be maintained as low-income multifamily housing for the next 30 years. In any other circumstance, this obvious and irreconcilable conflict would have been considered as a quintessential case of implied conflict preemption. Remarkably, despite the federal law and these facts, the Seventh Circuit held that the condemnation was not barred by MAHRA. In

doing so, the Seventh Circuit has turned MAHRA on its head and given the City of Joliet, and other jurisdictions who wish to eliminate federal low-income housing, the unilateral power to veto a property preserved and restructured under MAHRA. The Seventh Circuit's view here is at odds with the Fifth and Ninth Circuits, as well as this Court's recent decision in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009).

Second, the Seventh Circuit further damaged preemption jurisprudence when it suggested that federal programs, such as the federal housing programs at issue here, which make initial participation voluntary, lack the power to preempt conflicting state or local laws. The Seventh Circuit's tacit requirement that the federal program *must* be mandatory to have preemptive force lacks *any* support and is in direct conflict with the Fifth, Ninth, and Eighth Circuits and this Court's decision in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982).

The legal and real life import of the question presented here, and the conflict between the Fifth, Seventh, Eighth, and Ninth Circuits, provide ample grounds for this Court to grant review. Exempting the City of Joliet's actions from longstanding principles of implied preemption usurps Supremacy Clause and the myriad of federal laws and programs which rely upon its preemptive protections.

A. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A SPLIT IN THE CIRCUITS ON WHETHER "A FEDERAL PREEMPTIVE REGULATION WITH THE FORCE OF LAW" IS REQUIRED TO IMPLIEDLY PREEMPT A STATE OR LOCAL LAW THAT DIRECTLY INTERFERES WITH THE FEDERAL LAW.

There is a pressing need for this Court to clarify what is required for a finding of implied conflict preemption. The Seventh Circuit's decision that "a preemptive regulation with the force of law" is required before "preemption [can be] inferred from a clash of goals and objectives" diverges markedly from the law of the Fifth and Ninth Circuits on this core issue. *New West*, 562 F.3d at 835. Left to stand, the Seventh Circuit's decision here poses a grave threat to other statutorily created federal programs that substantively conflict with state or local law, but are without the benefit of a "preemptive regulation with the force of law."

Under the Supremacy Clause of the Constitution, Congress has the power to preempt state law. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land"). *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (state and local laws that "interfere with, or are contrary to," federal law are invalid and preempted.) Federal legislation may expressly preempt state law, or it may do so implicitly in at least two other ways – where Congress intends the federal law to "occupy the field," and where state law conflicts with federal law. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372

(2000). Conflict preemption exists "where it is impossible for a private party to comply with both state and federal law," or where, as is the situation here, the challenged law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 372-73 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941)). To determine whether a state or local law is a "sufficient obstacle" to federal law to trigger preemption the federal law should be examined as a whole while identifying "its purposes and intended effects." *International Paper Co. v. Ouellette, et al.*, 479 U.S. 481, 494 (1987); *Crosby*, 530 U.S. at 373. Ultimately, congressional intent is the dispositive factor in a preemption analysis. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992); *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004).

In step with this Court's view of implied conflict preemption, the Fifth and the Ninth Circuits recognize — in condemnation cases — the long standing view that a specific federal agency regulation with the force of law is not required in conflict preemption analysis. Rather, the operative focus is a substantive review of the state and federal law and not a stated agency position on preemption. In *City of Morgan City v. South La. Elec. Coop. Ass'n*, 31 F.3d 319 (5th Cir. 1994), *as modified*, 49 F.3d 1074, *cert. denied*, 516 U.S. 908 (1995), the Fifth Circuit focused on how the city's proposed condemnation of all of the property of a rural power cooperative financed by the federal government would frustrate the objectives of the Rural Electrification Act ("REAct"), 7 U.S.C. §§ 901 *et seq.* The REAct aimed to

encourage rural electrification through low-interest, federally insured loans and loan guarantees to power cooperatives. *Id.* at 322. The Fifth Circuit determined that, under the *Supremacy Clause*, a state municipal public utility could not condemn property owned by a federally subsidized public utility because the condemnation would frustrate and "stand as an obstacle" to the objectives of the statutorily created federal rural electrification program. *Id.* at 324.

Likewise, in *Public Utility District No. 1 of Pend Oreille v. United States*, 417 F.2d 200 (9th Cir. 1969), the Ninth Circuit barred a similar taking under the *Supremacy Clause*, finding that the proposed condemnation of property owned by a federally subsidized public utility would frustrate the objectives of the statutorily created federal rural electrification program. *Id.* at 201. The Ninth Circuit also expressly recognized that the objectives of the statutorily created federal program are still frustrated, and therefore preempted, even if the federal government was compensated. *Id.*

Here, as in *Morgan City* and *Pend Orielle*, there is a significant risk that the local condemnation action could seriously impair a cohesive federal program *See City of Morgan*, 31 F.3d 319 (5th Cir. 1994); *Pend Oreille*, 417 F.2d 200. In *Morgan City*, the Fifth Circuit noted that although the particular condemnation affected only a few hundred individuals, permitting such condemnation would result in "piecemeal erosion" in other "areas" and "other cities" and would threaten the "financial viability"

of the federal program. 31 F.3d at 324. Here, local condemnation not only affects Evergreen Terrace but also would result in "piecemeal erosion" of the federal housing in Joliet and other cities throughout the United States. This would not only reduce the supply of federal affordable housing, but also increase the cost of and strain on the limited remaining affordable housing supply. Just as local condemnation of federally subsidized utilities threatened federal programs to provide and increase the supply of affordable utilities, here local condemnation of federally subsidized housing threatens to seriously frustrate the federal purpose of providing and increasing the supply and affordability of low-income housing.

In spite of this backdrop, the Seventh Circuit concluded that "a preemptive regulation with the force of law" is required before "preemption [can be] inferred from a clash of goals and objectives." *New West*, 562 F.3d at 835. The Seventh Circuit purported to derive its flawed approach to implied preemption from this Court's decision in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). Contrary to the Seventh Circuit's interpretation, *Wyeth* manifestly did not dictate the result the Seventh Circuit reached and does not require a federal "regulation with the force of law" for a finding of implied preemption. *Wyeth*, 129 S. Ct. at 1190. Indeed, the Seventh Circuit's regulation mandate was firmly rejected by this Court in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 884-85 (2000). *Wyeth* did not overrule *Geier*. *Wyeth*, *Geier*, and *Hines*, all recognize that conflict preemption exists where a challenged state or local law stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Wyeth, 129 S. Ct. at 1201 (quoting *Hines*, 312 U.S. at 67). Thus, the Seventh Circuit's decision is an unwarranted and drastic departure from longstanding principles of implied conflict preemption.

In reaching its conclusion, the Seventh Circuit largely ignored MAHRA's stated purposes and objectives and most importantly, its operative provisions. When Congress enacted MAHRA in 1997, its stated intent was, *inter alia*, "to preserve low-income rental housing affordability and availability while reducing the long-term costs of project-based [federal] assistance"; "to encourage owners of eligible multifamily housing projects to restructure their FHA-insured mortgages"; "to resolve the problems affecting financially and physically troubled federally insured and assisted multifamily housing projects through cooperation with residents, owners, State and local governments, and other interested entities"; and "to protect the interest of project owners and managers, because they are partners of the Federal Government in meeting the affordable housing needs of the Nation." MAHRA § 511(b)(1), (3),(6),(7).

The operative provisions of MAHRA, which were not even acknowledged by the Seventh Circuit, provide the clearest evidence of Congress's intent to preempt a city condemnation of housing that HUD preserved under MAHRA. To carry forth this objective to preserve and rehabilitate privately-owned, federally subsidized and insured low-income housing, Congress created an elaborate and detailed scheme through which these owners refinance their debt and, in return, make certain statutorily required commitments. HUD has

promulgated extensive regulations governing that process. *See* 24 C.F.R. pts. 401 & 402. In fact, as required by MAHRA and the regulations, HUD develops the restructuring plan for the owners' refinancing. MAHRA § 514(a)(1); *see also* 24 C.F.R. §§ 401.100, 401.101 (eligibility criteria). HUD hires a "Participating Administrative Entity ("PAE") to undertake that project, *see* MAHRA §§ 512(10), 513, and the PAE assesses whether there is "adequate[,] available and affordable" alternative housing in the particular market should this project not be preserved, *id.* § 515(c)(1)(A). A final MAHRA restructuring plan requires the owner to rehabilitate the property as necessary and to provide adequate reserves to maintain it in decent and safe condition pursuant to established standards. MAHRA § 514(e)(5).

Most importantly, MAHRA requires that the restructuring plan mandate that the project owner (and the owners of Evergreen Terrace) "maintain affordability and use restrictions in accordance with regulations promulgated by [HUD], for a term of not less than 30 years," and place those agreements in recorded and legally enforceable documents. MAHRA § 514(e)(6).[5] HUD or the PAE are responsible for

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[5] Contrary to MAHRA, the Seventh Circuit concluded that the MAHRA required-use restriction was in effect only as long as the federally insured loan and that the restriction could be eliminated if the low-income housing owner simply paid off the federally insured loan. The Seventh Circuit's position relied upon 24 C.F.R. pt. 248, which deals with two distinct and defunct federal housing programs and not MAHRA housing projects. Unlike Part 248, MAHRA and its implementing regulations, (Cont'd)

ensuring "long-term compliance" with MAHRA and the "binding contractual agreements with owners" executed thereunder. MAHRA § 519(a); *see also* 24 C.F.R. § 401.550.

Congress therefore fully expected that, once a property has undergone extensive restructuring, it will remain in the nation's housing stock for low-income families for at least 30 years. These operative provisions show that the City's initiation of condemnation proceedings against Evergreen Terrace presents a clear obstacle to the accomplishment and execution of the full purposes and objectives of Congress when it enacted MAHRA. No "preemptive regulation with the force of law" is necessary to see the obvious conflict here — the City of Joliet seeks to tear down what Congress seeks to preserve. Yet, under the Seventh Circuit's restrictive view of implied preemption, without such a regulation, a property that has undergone a MAHRA restructuring could still be taken through the exercise of eminent domain and diverted to a use fundamentally at odds with Congress's objectives under MAHRA section 514(e)(6).

Allowing the Seventh Circuit's decision to stand poses a grave threat to the low-income federal housing programs subject to MAHRA, which carry out Congress's explicit intent to facilitate the private ownership of multifamily properties that provide decent,

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(Cont'd)
24 C.F.R. pt. 401) have no provisions regarding mortgage prepayment. The prepayment of Evergreen Terrace's mortgage would *not* extinguish the 30-year use restriction mandated by MAHRA section 514 (e)(6).

affordable rental housing for low-income families and to ensure long term preservation of that housing. MAHRA §§ 511(b)(1), (3), (6). Permitting the condemnation to move forward, absent HUD approval, directly frustrates the purposes and objectives that Congress sought to achieve when it created the MAHRA program — namely the preservation of affordable multifamily housing. *Id.*

Left untouched, the Seventh Circuit's decision could also embolden local governments throughout this country to eliminate federally-created low-income housing programs through condemnation. Such actions would plainly frustrate Congress's intent with MAHRA, to provide affordable housing to low-income families throughout the nation. A fair examination of the proposed condemnation here, and its effects on Congress's objectives, leads to the undeniable conclusion that the City's condemnation action frustrates Congress's objectives and therefore is implicitly preempted by federal housing law. *See e.g. Perez v. Campbell*, 402 U.S. 637, 651-52 (1971) (determining that any "state legislation which frustrates the full effectiveness of federal law is rendered invalid by the *Supremacy Clause*").

If statutorily constructed federal programs can *only* preempt state or local law if there is a "federal regulation with the force of law" — even in cases confronting a direct conflict between the two laws, then this Court should make that test clear for the circuits.

B. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A SPLIT IN THE LOWER COURTS ON WHETHER OR NOT STATUTORILY CREATED FEDERAL HOUSING PROGRAMS, WHICH MAKE INITIAL PARTICIPATION VOLUNTARY, CAN PREEMPT CONFLICTING STATE OR LOCAL LAWS.

Breaking from its sister circuits, the Seventh Circuit erroneously concluded that there could be no "conflict between federal and state goals" because participation in MAHRA-related low-income housing programs is not "compulsory." *New West, L.P.*, 562 F.3d at 835. The Seventh Circuit's view that only federal laws that mandate a particular activity can be preemptive and that federal programs that make participation voluntary lack preemptive force is at odds with the decisions of the Fifth, Ninth, and Eighth Circuits. Those circuits recognize that the voluntary or mandatory nature of a federal program is irrelevant to the question of preemption. *City of Morgan City*, 31 F.3d at 324; *Pend Oreille County*, 417 F.2d at 202-03 (9th Cir. 1969) (finding that the central issue in preemption is the goal of Congress, not the program's mandatory or voluntary nature); *Forest Park II v. Hadley*, 336 F.3d 724 (8th Cir. 2003) (finding that Congress's decision to create certain federal low-income housing programs which permitted owners to voluntarily enter and exit the programs preempted a state law requiring these owners to do more.)

In contrast to the value the Seventh Circuit placed on whether or not the federal program's participation was voluntary, the Ninth, Fifth, and Eighth Circuits all determined that the key focus is whether or not the state or local law conflicts with the purposes and objectives of the Congress's goals, not any level of voluntariness in the program. *See also de la Cuesta*, 458 U.S. at 155 ("[t]he conflict does not evaporate because the Board's regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts and to enforce those provisions when the secur[ed] property is transferred").

The Seventh Circuit's decision also overlooks the important fact that, while the initial decision to enter the low-income housing program is voluntary, once a private owner enters the federal housing programs involved here, federal law mandates and regulates the private owner's ongoing participation. MAHRA § 514(e)(6).

The Seventh Circuit's tacit requirement that federal programs be mandatory in order to preempt state or local law has potentially damaging implications for the many federal housing incentive-based programs, such as under MAHRA, in which the federal government and the private sector work as partners to achieve national goals set by Congress. If the Seventh Circuit's approach to preemption remains untouched, local governments in this circuit will be permitted to directly interfere with and render obsolete MAHRA, a program constructed by Congress to ensure long term preservation of federally insured low-income housing benefitting from a considerable federal investment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FILED APRIL 9, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 08-3032 & 08-3033

CITY OF JOLIET, ILLINOIS,

Plaintiff-Appellee,

v.

NEW WEST, L.P., and NEW BLUFF, L.P.,

Defendants-Appellants.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND EVERGREEN TERRACE TENANTS,

Intervening Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 05 C 6746—**Charles R. Norgle, Sr.**, *Judge*

ARGUED JANUARY 12, 2009—DECIDED APRIL 9, 2009.

Appendix A

Before EASTERBROOK, *Chief Judge*, and WILLIAMS and SYKES, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. For several years the City of Joliet, Illinois, has been trying to acquire the Evergreen Terrace apartment complex, which the City believes is so run-down that it constitutes a public nuisance. After the City commenced eminent domain proceedings in state court, New West, a partnership that owns the complex, removed the proceeding to federal court and filed a suit under 42 U.S.C. § 1983 seeking an injunction and damages. The district court put the condemnation on ice and dismissed the § 1983 action-erroneously, we held in *New West, L.P. v. Joliet*, 491 F.3d 717 (7th Cir. 2007). We directed the district court to take up the condemnation proceeding first, as its disposition could resolve some or all of the issues in the § 1983 suit.

One of New West's arguments in the § 1983 suit was that, because it has accepted a federal subsidy under § 8 of the Housing Act of 1937, 42 U.S.C. § 1437f, federal law preempts the City's proceeding. Our opinion had this to say:

> New West contends that § 8 and the Fair Housing Act [42 U.S.C. §§ 3601-19] prevent condemnation of Evergreen Terrace, but it does not rely on any particular provision of that statute. Section 8 is a subsidy program, a carrot rather than a stick. HUD's regulations implementing the § 8 program

> contemplate the possibility of the parcel's condemnation; they do not purport to forbid condemnations. See 24 C.F.R. §§ 245.405, 248.101. For its part, the Fair Housing Act forbids discrimination in housing programs without providing that any given housing development has a right to continued existence. Just as with § 8, federal regulations implementing the FHA cover the demolition of housing projects. 24 C.F.R. Part 970, and exempt condemned buildings from these rules, see 24 C.F.R. § 970.3. If Joliet thinks that a given parcel of land should be put to a public use, such as a park, and is willing to foot the bill, it is hard to see any obstacle in federal law.

491 F.3d at 721. In the district court the Department of Housing and Urban Development intervened and contended that § 221 of the National Housing Act of 1954 (as amended in 1961 and 1966), 12 U.S.C. § 1715*l*, and the Multifamily Assisted Housing Reform and Affordability Act of 1997, 42 U.S.C. § 1437f note, block condemnation. The district court rejected that contention in reliance on our opinion, but, after concluding that HUD was making new arguments that we had not addressed, certified the case for interlocutory appeal under 28 U.S.C. § 1292(b). We accepted the appeal, because we thought that HUD was relying on particular language said to preempt state and local condemnation laws. Now that the appeal has been fully briefed and argued, however, HUD and the other

parties acknowledge that neither of these statutes has any clause preempting state law. At this point we could stop and affirm, relying on the law of the case. But because HUD was not a party to the first appeal, and has invoked two statutes that New West did not mention, we think it best to give the Department a full hearing and plenary decision.

First, however, a word on subject-matter jurisdiction. Joliet contends that there is none, because when the case was removed HUD was neither a party to the suit nor even a lender to New West. The eminent domain proceeding arises under state and local law. Although New West raised preemption as a federal defense, it has long been understood that a federal defense does not support removal. See, e.g., *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987); *Gully v. First National Bank*, 299 U.S. 109 (1936); *Bennett v. Southwest Airlines Co.*, 484 F.3d 907, rehearing denied, 493 F.3d 762 (7th Cir. 2007). (The exception for "complete preemption," see *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), does not apply; no one argues that federal law occupies the fields of housing or municipal powers.)

Still, the presence of the national government as a party with a security interest in the real estate supplies jurisdiction. 28 U.S.C. §§ 1444, 2410. It would be pointless to order this suit remanded, only to have HUD re-remove it in a trice. The Supreme Court has held that, when a suit is removed prematurely, the district

court may proceed if it has subject-matter jurisdiction at the time it enters judgment. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951); *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972); *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996). This rule, coupled with the presence of HUD (and its desire to have the suit resolved in federal court), means that remand is unnecessary.

Three federal statutes are involved in this proceeding, and HUD contends that two of them preempt state and local law. The first statute, § 8 of the Housing Act, 42 U.S.C. § 1437f, provides federal rent subsidies for low-income tenants; as we observed in 2007, this statute does not preempt any state or local law. HUD concurs. The second is § 221 of the National Housing Act, 12 U.S.C. § 1715*l*. This statute creates a program under which the federal government insures mortgages on privately owned, multifamily properties, some tenants of which receive rent subsidies under § 8. HUD has established criteria that owners must meet before a loan is insured. HUD also is authorized to pay off the private lenders and become a direct lender. For descriptions of this program, see *Cienega Gardens v. United States*, 194 F.3d 1231 (Fed. Cir. 1998), and *Geneva Towers Tenants Organization v. Federated Mortgage Investors*, 504 F.2d 483 (9th Cir. 1974). The final statute, the Multifamily Assisted Housing Reform and Affordability Act of 1997, 42 U.S.C. § 1437f note, allows HUD to renegotiate mortgages insured or assumed under § 221 of the National Housing Act. High mortgage payments make it hard (sometimes impossible) for

owners to offer below-market rents to their tenants; renegotiated mortgages with lower monthly payments cut the rents to the beneficiaries of the § 8 program. Owners who seek lower mortgage payments under the 1997 Act must promise to keep their rental properties available to low-income tenants for 30 years.

Evergreen Terrace, which has 356 apartments, has participated in the § 8 and § 221 programs since the 1960s. By the late 1970s the owner was in default on its mortgage loans. HUD paid off the lenders, became the mortgage holder, foreclosed, and took title to the complex. New West purchased part of the complex from HUD in 1980 for $1, and the rest in 1982 for another $1. New West took out large mortgage loans, which HUD insured under § 221. New West promised both the lenders and HUD that it "will not permit or suffer the use of any of the property for any purpose other than the use for which the same was intended at the time this Mortgage was executed."

In 2001 New West asked HUD to restructure the mortgages under the 1997 Act, reducing the monthly payments. Both the Illinois Housing Development Authority and Heskin Signet Partners reported to HUD that the approximately 600 residents of Evergreen Terrace lack other available options for low-income housing. Relying on these reports, HUD approved the restructuring in 2006, paid off the original lenders, and became the lender (and mortgage holder) itself. As part of the transaction, New West promised that, for the next 30 years, the property "shall be used solely as rental

housing with no reduction in the number of residential units unless approved in writing by HUD". New West simultaneously entered into new 20-year agreements with HUD for § 8 subsidies to low-income tenants. These agreements undertake not to transfer, assign, or encumber the property without HUD's approval.

When we agreed to hear this interlocutory appeal, we understood HUD to argue that the contracts that New West had signed in 2006 themselves preempted any state and local powers of condemnation, and we directed the parties to address the question how New West could give away a governmental power that it never possessed. (Neither the City of Joliet nor the State of Illinois has made any promise to HUD about the maintenance of Evergreen Terrace.) HUD's appellate brief responded to our inquiry by disclaiming this theory of preemption. The contracts do not affect state or local powers, HUD recognizes. Owners such as New West must comply with all state and local laws-indeed, 24 C.F.R. § 883.310(b)(6) specifies that recipients of federal assistance are bound by all "[a]pplicable State and local laws, codes, ordinances, and regulations."

Why isn't eminent domain among these applicable state and local laws? HUD's answer is that condemnation would interfere with the purposes of § 221 and the 1997 Act. Both statutes are designed to enlarge, or at least preserve, the stock of housing available for low-income tenants. The "findings" in § 511 of the 1997 Act make this explicit. If Joliet can condemn Evergreen Terrace, 356 apartments for low-income

tenants will disappear, and these tenants do not have ready alternatives. (That's what the Illinois Housing Development Authority and Heskin Signet Partners concluded.) Removing 356 units from the housing stock could undermine achievement of the national purpose and so is preempted, the argument concludes. This line of argument implies that local government cannot condemn *any* housing, whether or not the owner has secured federal financing-for demolition of unsubsidized units diminishes the supply, and drives up the price of remaining units, as surely as the demolition of units that already enjoy federal subsidies. Yet none of the litigants ventures an argument *that* bold.

The question at hand is whether a state or local law can be preempted by the "findings" and "purposes" clauses of a federal statute, even though the state or local law does not conflict with any rule of law established in the federal statute. Recently the Supreme Court emphasized that preemption inferred from a clash of goals and objectives should not be used expansively, unless the agency has issued a preemptive regulation with the force of law, and that an agency's view that application of local law would interfere with the national objective is no substitute for such a regulation. *Wyeth v. Levine*, No. 06-1249 (U.S. Mar. 2009), slip op. 17-25. Justice Breyer filed a concurring opinion to stress the importance of a preempting regulation, and Justice Thomas, concurring in the judgment, expressed doubt about this entire category of implied preemption.

Appendix A

HUD does not contend that any federal regulation prevents state and local governments from using eminent domain or otherwise exercises the federal power of preemption under the Supremacy Clause. One federal regulation issued under the statutes at issue does preempt state and local law, but HUD understandably does not rely on (or even mention) it. This regulation, 24 C.F.R. § 248.183, says that no state or local law may prevent any borrower under the federal programs from prepaying the loan, and that no state or local law may set a cap on the rate of return that owners participating in the federal programs may realize. Subsection (c) of this regulation says that other state and local laws, such as zoning and building standards, are not preempted. So federal regulations not only do not contain the sort of clause that the Justices thought important in *Wyeth* but also state that most state property regulations survive. True, this savings clause does not mention eminent domain, but the main point is that no federal regulation even tries to displace local governments' power to take ownership of property by paying just compensation.

The approach of *Wyeth* to one side, it is hard to see any conflict between federal and state goals, because (a) none of the three statutes at issue makes participation compulsory; it is not a violation of federal law for a given owner to remain outside the program, so it cannot be said that federal law demands that a particular apartment unit remain standing; and (b) the agreements by which private owners enter the program do not diminish state and local powers (as HUD concedes).

Appendix A

Private owners are entitled to withdraw their properties from the program at any time despite their 20-year and 30-year promises. All they have to do is pay off the federally insured loan. 24 C.F.R. Part 248. The conditions last only as long as the loans. If private owners can withdraw (and then demolish) their properties without violating any rule of federal law, why can't state or local governments acquire the properties through eminent domain and then withdraw and demolish them? The regulations treat condemnation as one legitimate source of proceeds used to prepay and retire the loans, and thus to escape the conditions. 24 C.F.R. § 248.101. Indeed, the regulatory approval needed to prepay the loans and withdraw from the program voluntarily is not required when proceeds of condemnation are the source of funds used to pay off the loans. *Ibid.* By treating condemnation as a special case, one that removes the property from an otherwise-required approval, the agency has shown that condemnation is possible. What's the point of a special rule for applying the proceeds of condemnation if, as HUD argues, condemnation is always preempted?

Another regulation provides that HUD's approval for changing a property's use is not required when the change results from eminent domain. 24 C.F.R. § 245.405, § 970.3. And that's not all. The documents that New West signed contemplate the possibility of condemnation. Paragraphs 6 and 8 of the loans and mortgages provide that the proceeds of condemnation must be paid first to the lenders (including HUD) until the loans have been satisfied; that's a strange proviso if

condemnation is always forbidden by federal law. HUD dismisses all of these clauses, and its own regulations, as irrelevant because they are not issued under the 1997 Act, but the fact remains that there is no *affirmative* declaration of preemption in any statute or rule, no concrete conflict between condemnation and any part of the 1997 Act, and no good reason to think that the 1997 Act contravenes HUD's own regulations under § 8 and § 221.

All that can be said is that, when housing is withdrawn by prepayment (including prepayment made possible by just compensation paid for a taking), the statutory goal of increasing (or at least preserving) the stock of low-income housing is undercut. Yet HUD does not point to any decision of the Supreme Court holding a state or local law preempted by broad goals (such as that more housing is better than less, low prices better than high prices) or by a general declaration such as "there exists throughout the Nation a need for decent, safe, and affordable housing", § 511(a)(1) of the 1997 Act. Nor has HUD cited any decision of any federal court holding that § 221 or the 1997 Act-or for that matter any other subsidy system, such as farm price supports or loan guarantees for veterans or small business owners, all of which include "findings" sections comparable to § 511-preempts any state or local authority to take ownership through eminent domain.

That silence is telling. We do not deal here with a city or state as regulator of private conduct. Eminent domain is a governmental power. Many decisions of the

Supreme Court hold that only a clear statement in a national statute can supersede a governmental body's own operations. See, e.g., *Cook County Solid Waste Agency v. Corps of Engineers*, 531 U.S. 159, 171 (2001); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). HUD does not contend that any language in § 221 or the 1997 Act supplies a "clear statement" of a national decision to displace eminent domain. As we have mentioned, there is no statement to that effect, clear or otherwise. There is only HUD's contention that condemnation will interfere with national goals. That stripe of argument was made in *Solid Waste Agency* and *Gregory*, where it did not prevail. Congress may well have the power to prevent state or local governments from condemning low-income housing, but it has not declared that it has exercised that power; there has been no debate, no opportunity for the states to make their positions known to Congress, no proposed regulation with preemptive effect, and no focused decision by the Legislative and Executive Branches of the national government.

Quite apart from the Supreme Court's plain-statement canon for federalism cases, there is the principle that general statements of national policy do not preempt concrete laws. "Findings" and "purpose" clauses are common in federal statutes. Like the clauses in § 511 of the 1997 Act, they are usually sweeping in scope and declare an urgent need to solve a problem. But in legislation details matter. How far will the legislature go, and what costs will it bear, to achieve its ends? "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be

sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis in original). When courts rely on purpose clauses, rather than the concrete rules that the political branches have selected to achieve the stated ends, judges become effective lawmakers, bypassing the give-and-take of the legislative process. It is therefore no surprise that the Supreme Court does not think that declarations of purpose, however sweeping, preempt state or local laws. See *Hawaii v. Office of Hawaiian Affairs*, No. 07-1372 (U.S. Mar. 31, 2009), slip op. 10-11 (37 "whereas" clauses setting out congressional findings and reasons for adopting a joint resolution do not have any effect independent of the resolution's two operative clauses).

Consider *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988). A federal statute ended most federal price controls for petroleum and natural gas. The statute's purpose clause (and the accompanying committee reports) declared that it is bad policy to interfere with the market's pricing mechanism, in the absence of monopoly or equivalent concerns. Puerto Rico continued to enforce its own price controls for these products, and the producers contended that the Commonwealth's legislation was preempted by the combination of the purpose clause, the end of federal regulation, and the legislative history showing the intent

behind these provisions. A court of appeals agreed and held the law preempted—but the Supreme Court reversed.

The Court explained: "While we have frequently said that pre-emption analysis requires ascertaining congressional intent . . . , we have never meant that to signify congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text. . . . Respondents have brought to our attention statements that may reflect general congressional approval of a free market in petroleum products, or general congressional belief that such a market would result from enactment of the [statute], or even general congressional desire that it result. But unenacted approvals, beliefs, and desires are not laws. Without a text that can, in light of those statements, plausibly be interpreted as *prescribing* federal pre-emption it is impossible to find that a free market was mandated by federal law." 485 U.S. at 501 (emphasis in original). In other words, it takes a federal command to preempt a state or local law; a conflict between a local law and legislative aspirations does not displace another jurisdiction's law. *Wyeth* reiterated that point. Cf. *American Hospital Ass'n v. NLRB*, 499 U.S. 606 (1991); *Lincoln v. Vigil*, 508 U.S. 182 (1993). Similarly, Congress desired (and hoped) that § 211 and the 1997 Act would increase the stock of low-income housing, but a text that preempts state or local legislation is not among the steps that Congress took toward that objective.

This is not to say that federal law leaves local powers unaffected. A state or local government is not free to use its powers in order to discriminate against persons of a particular race, for example. And federal law limits the use of condemnation powers (as well as zoning or building codes) to turn a jurisdiction into an all-white, upper-income enclave. See *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Cf. *Wisconsin Community Services, Inc. v. Milwaukee*, 465 F.3d 737 (7th Cir. 2006) (en banc). But HUD does not contend that Joliet has invoked the power of eminent domain with an intent, or an effect, forbidden by the Constitution or a federal statute; HUD maintains that the City does not *have* a power to condemn federally subsidized housing, no matter how run-down the building, no matter how large the remaining supply of housing for low-income tenants, and no matter the use to which the city will put the land. On HUD's view, a city is forbidden to acquire and raze a decrepit and dangerous building, near a brand new apartment block with unused low-income units, in order to replace the old building with a new park or city hall—and this is so even if the federal appropriation can be redirected to another property to maintain the aggregate supply of low-income housing. (HUD does not contend that condemnation of Evergreen Terrace would leave it unable to spend its full appropriation.) Such a sweeping displacement of governmental authority cannot be imputed to § 221 or the 1997 Act. It might be sensible to enact a system under which HUD could certify a lack of affordable housing in a given locale and thus block any steps to diminish the existing stock. But no federal

statute gives HUD this authority, let alone one that can be exercised without notice to the cities whose powers will be diminished.

Although HUD concedes that no court has attributed any preemptive effect to § 221 or the 1997 Act, it urges us to draw guidance from *Public Utility District No. 1 of Pend Oreille County v. United States*, 417 F.2d 200 (9th Cir. 1969), and *Morgan City v. South Louisiana Electric Cooperative Ass'n*, 31 F.3d 319 (5th Cir. 1994), amended and rehearing en banc denied (over dissent), 49 F.3d 1074 (5th Cir. 1995). These decisions held that federal law preempts state or local efforts to condemn rural electric utilities that enjoyed federal financing under the Rural Electrification Act, 7 U.S.C. § 901 *et seq.* (At least one court of appeals has reached a contrary conclusion. See *Stilwell v. Ozarks Rural Electric Cooperative Corp.*, 79 F.3d 1038 (10th Cir. 1996).) As HUD sees things, the decisions of the fifth and ninth circuits show that local condemnation powers are incompatible with federally subsidized financing designed to achieve a federal goal (whether providing electricity to farms or housing to low-income renters).

Neither the fifth circuit nor the ninth discussed the clear-statement rule for preemption of core governmental powers, or the need (which the Court stressed in *ISLA Petroleum*) to find a conflict with a concrete statutory text. Perhaps those principles were not argued in those cases. To the extent these courts think that federal financing routinely displaces state laws, their decisions cannot be reconciled with *Arkansas*

Electric Cooperative Corp. v. Arkansas Public Service Comm'n, 461 U.S. 375 (1983), and *Wabash Valley Power Ass'n v. Rural Electrification Administration*, 903 F.2d 445 (7th Cir. 1990). What is more, both the fifth and the ninth circuits stressed that the federal interest was not principally related to financing. The problem with local condemnation is that electricity is distributed by a *network*. Pull out one generating station or set of transmission lines, and the rest of the network can be adversely affected. "This is not an ordinary case because what is sought to be taken here is part of a system and [if one part is condemned] a question remains as to the capacity of the remaining portions of the system to function." *Pend Oreille*, 417 F.2d at 201. One jurisdiction's condemnation thus could affect consumers in other jurisdictions; that justified a federal role. There is no comparable network externality when one city condemns an apartment block.

New West, and a tenants' association at the apartment complex, advance additional arguments, none of which HUD supports. They contend, for example, that condemnation of Evergreen Terrace violates the Contract Clause (Art. I § 10 cl. 1) because it will affect the contracts that New West has with other entities. But "the Contract Clause has never been thought to protect against the exercise of eminent domain." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 243 n. 6 (1984). A state cannot displace a contract by fiat, but it may take interests in contracts, as in other property. New West and the tenants' association contend that, if this is so, then Joliet must be trying to take HUD's

mortgage interests in Evergreen Terrace, and as no state may acquire federal property against the wishes of the national government, see *Armstrong v. United States*, 364 U.S. 40, 43 (1960), it follows that the City's resort to eminent domain violates the Property Clause (Art. IV § 3 cl. 2) or principles of intergovernmental immunity. Yet the national government does not own Evergreen Terrace, which Joliet proposes to acquire. HUD's interest is as a secured creditor of New West. No case of which we are aware holds that the Property Clause (or any other part of the Constitution) treats a federal loan as immunizing the borrower from state regulation (including eminent domain) on the theory that the state is "really" regulating the federal interest as a lender. One might as well say that if New West owed taxes, and the IRS had placed a lien on Evergreen Terrace, that step would prevent the City from using eminent domain (or a bankruptcy court from selling the building to satisfy New West's other creditors).

This eminent domain proceeding has been stalled since its institution more than three years ago. We trust that the district court will now bring it to a speedy conclusion.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED JULY 16, 2008

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

July 16, 2008

Before

FRANK H. EASTERBROOK, *Chief Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No.: 08-8019.

IN RE:
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Petitioner

No.: 08-8020

IN RE:
NEW WEST, an Illinois Limited Partnership, and NEW BLUFF, an Illinois Limited Partnership,

Petitioners

Appendix B

Originating Case Information:

District Court No: 1:05-cv-06746

Northern District of Illinois, Eastern Division Clerk/ Agency Rep Michael Dobbins

District Judge Charles Norgle

The following are before the court:

1. FEDERAL DEFENDANT'S PETITION FOR PERMISSION TO APPEAL INTERLOCUTORY ORDERS PURSUANT TO 28 U.S.C. § 1292(b), filed on June 25, 2008, by counsel for petitioner United States Department of Housing and Urban Development in appeal no. 08-8019.

2. PETITIONER-DEFENDANTS' PETITION FOR PERMISSION FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b), filed on June 27, 2008, by counsel for petitioners New West and New Bluff in appeal no. 08-8020.

3. PLAINTIFF-RESPONDENT CITY OF JOLIET'S ANSWER IN OPPOSITION TO HUD'S PETITION FOR PERMISSION TO APPEAL INTERLOCUTORY ORDERS, filed on July 7, 2008, by counsel for respondent in appeal no. 08-8019.

4. PLAINTIFF-RESPONDENT CITY OF JOLIET'S ANSWER IN OPPOSITION TO NEW WEST'S PETITION FOR PERMISSION TO APPEAL INTERLOCUTORY ORDERS, filed on July 9, 2008, by counsel for respondent in appeal no. 08-8020.

5. REPLY TO RESPONDENT'S ANSWER TO PETITION FOR PERMISSION TO APPEAL INTERLOCUTORY ORDERS, filed on July 15, 2008, by counsel for petitioner United States Department of Housing and Urban Development in appeal no. 08-8019.

6. CITY OF JOLIET'S MOTION TO CONSOLIDATE APPELLATE CASE NUMBERS 08-8019 AND 08-8020 AND TO FILE A CONSOLIDATED RESPONSE TO PETITIONS FOR PERMISSION TO FILE INTERLOCUTORY APPEALS, filed on July 1, 2008, by counsel for respondent in appeal nos. 08-8019 and 08-8020.

IT IS ORDERED that the petitions for permission to appeal are GRANTED. In addition to any other issues that counsel think appropriate, the briefs should address the question whether a contract between a private developer and a federal agency can curtail a government's power of condemnation. (In other words, how can New West "agree" to a surrender of governmental powers that it does not possess?) Any federal statutes or regulations bearing on this subject

should be cited and discussed. The petitioners shall pay the required appellate fees to the clerk of the district court within ten days from the entry of this order pursuant to Federal Rule of Appellate Procedure 5(d)(1). Once the district court notifies this court that the fees have been paid, the appeals will be entered on this court's general docket.

IT IS FURTHER ORDERED that the resulting appeals will be CONSOLIDATED for the purposes of briefing and disposition.

IT IS FINALLY ORDERED that in light of the interlocutory posture of the appeal, extensions of time to file briefs will not be granted, and the case will be set for argument promptly after receipt of the appellee's brief.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION FILED JUNE 13, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

05 C 6746

Hon. Charles R. Norgle

CITY OF JOLIET, an Illinois Municipal Corporation,

Plaintiff,

v.

MID-CITY NATIONAL BANK, et al.,

Defendants.

OPINION AND ORDER

Before the court are Defendants New West/New Bluff's and the United States Department of Housing and Urban Development's ("HUD") Petitions for Interlocutory Appeal. For the following reasons, the Petitions are granted.

Appendix C

I. BACKGROUND

On August 3, 2007, the court entered an order granting the City of Joliet's Motion for Judgment on the Pleadings with regard to the Supremacy Clause defense. The court denied HUD's Motion for Reconsideration on March 18, 2008. On March 25, 2008, the court denied HUD's Motion for Summary Judgment.[1] HUD's Motion for Summary Judgment was based on the Contracts Clause and the Property Clause of the United States Constitution, and the doctrine of intergovernmental immunity. In separate Petitions, Defendants New West/New Bluff and HUD now petition the court to certify the court's orders of August 3, 2007, March 18, 2008, and March 25, 2008 for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

II. DISCUSSION

A. Standard of Decision

The movant seeking the grant of a motion to certify an interlocutory order for immediate appeal pursuant to 28 U.S.C. § 1292(b) bears a heavy burden, as only "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment." *Fisons Limited v. United States*, 458 F.2d 1241, 1248 (7th Cir. 1972). The statutory text of 28 U.S.C. § 1292(b) provides, *inter alia:*

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1. A full Opinion issued on March 27, 2008.

Appendix C

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

See also In re Ford Motor Co., 344 F.3d 648, 653 (7th Cir. 2002); *Ahrenholz v. Bd. of Trs. of the U. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000). "There are four statutory criteria for the grant of a section 1292(b) petition to guide the district court: there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation." *Ahrenholz*, 219 F.3d at 675. "There is also a nonstatutory requirement: the petition must be filed in the district court within a *reasonable time* after the order sought to be appealed." *Id.* When a district court certifies an order for interlocutory appeal, the court should identify the question it believes meets the criteria for interlocutory review. *See In the Matter of Arthur J. Hamilton*, 122 F.3d 13, 14 (7th Cir. 1997).

Appendix C

B. 28 U.S.C. § 1292(b) Criteria

I. Question of Law

The first statutory criterion under § 1292(b) is that the court be presented with a question of law. In *Ahrenholz*, the Seventh Circuit provided a definition of "question of law," stating that a "'question of law' as used in section 1292(b) has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine . . . ." 219 F.3d at 676. The Seventh Circuit then emphasized that the framers of § 1292(b) intended the term "question of law" to refer to "'pure' question[s] of law rather than merely to an issue that might be free from a factual contest." *Id.* at 676-77.

Here, Defendants present the court with the question of whether the Supremacy Clause, the Contracts Clause, or the Property Clause of the United States Constitution, or the doctrine of intergovernmental immunity, preempts and/or prohibits a municipality from exercising its powers of eminent domain over privately owned property in which the federal government claims an interest, and which property is subject to Regulatory Agreements required by the National Housing Act ("NHA") and the Multifamily Assisted Housing Reform and Affordability Act ("MAHRA"). The court finds that this question presents an "abstract issue of law . . . suitable for determination by an appellate court without a trial record." *See Ahrenholz*, 219 F.3d at 677;

see also Hamilton, 122 F.3d at 14. The court therefore determines that Defendants have properly articulated a question of law within the meaning of § 1292(b).

2. Controlling

The second statutory criterion under § 1292(b) is that the question of law be controlling. A question of law is controlling "if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enter. Corp., v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996). Here, if the Seventh Circuit were to determine that Joliet's condemnation action was preempted and/or prohibited, the district court would likely be required to dismiss this case. The court therefore determines that the question presented for interlocutory appeal is controlling.

3. Contestable

The third statutory criterion under § 1292(b) is that the question of law be contestable, i.e., that substantial grounds for a difference of opinion on the issue exist. An issue is contestable within the meaning of § 1292(b) if there is a "difficult central question of law which is not settled by controlling authority," and a "substantial likelihood" exists that the district court's ruling will be reversed on appeal. *In re Brand Name Prescription Drugs Antitrust Litigation*, 878 F. Supp. 1078, 1081 (N.D. Ill. 1995).

Defendants assert that neither the Seventh Circuit nor any other Circuit Court of Appeals has specifically addressed the preemption arguments raised in this case in relation to the NHA and the MAHRA. The court agrees. While the court is loath to determine that there is a "substantial likelihood" that it will be reversed on appeal, the court determines that the issue presented in Defendants' Petitions is contestable.

4. Materially Advance the Litigation

The fourth statutory criterion under § 1292(b) is that resolution of the question of law "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also Ahrenholz*, 219 F.3d at 675. As the court has already indicated, should Defendants prevail on this issue, the court may well be required to dismiss this case. The court therefore determines that resolving the issue of law presented by Defendants has the potential to materially advance this litigation.

5. Timeliness

Although there is no statutorily imposed time frame for filing a petition for interlocutory review with the district court, such requests must be filed within a reasonable period of time after the entry of the order for which such review is sought. *Ahrenholz*, 219 F.3d at 675. The New West/New Bluff Defendants filed their Petition for Interlocutory Review on April 11, 2008. HUD filed its Petition on May 14, 2008. The orders sought to be certified for interlocutory appeal were

entered on August 3, 2007, March 18, 2008, and March 25, 2008. The court finds that Defendants have filed their Petitions for Interlocutory Review within a reasonable time.

III. CONCLUSION

For the foregoing reasons, the court certifies its August 3, 2007, March 18, 2008, and March 25, 2008 orders for interlocutory review. The question the court believes meets the criteria for interlocutory review by the Seventh Circuit is the following: whether the Supremacy Clause, the Contracts Clause, or the Property Clause of the United States Constitution, or the doctrine of intergovernmental immunity, preempts and/or prohibits a municipality from exercising its powers of eminent domain over privately owned property in which the federal government claims an interest, and which property is subject to Regulatory Agreements required by the NHA and the MAHRA.

IT IS SO ORDERED.

s/ Charles R. Norgle
CHARLES RONALD NORGLE, Judge
United States District Court

Dated: June 13, 2008

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION FILED MARCH 27, 2008

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 05 C 6746

Honorable Charles R. Norgle

CITY OF JOLIET, an Illinois Municipal Corporation,

Plaintiff,

v.

MID-CITY NATIONAL BANK OF CHICAGO, et al.,

Defendants.

OPINION AND ORDER

CHARLES R. NORGLE, District Judge.

Before the court are two Motions for Summary Judgment, one filed by Defendant United States Department of Housing and Urban Development ("HUD") and the other filed jointly by the remaining Defendants. For the following reasons, the Motions are denied.

Appendix D

I. BACKGROUND

A. Facts

Plaintiff City of Joliet, Illinois ("Joliet" or the "City") is authorized under the Illinois Municipal Code to exercise the right of eminent domain to acquire real property, *inter alia*, (1) for the public welfare, (2) where acquisition of such property is necessary for the rehabilitation or redevelopment of any blighted or slum area, or (3) where acquisition of such property is necessary for the establishment of public parks, other public grounds, or recreational facilities. Joliet has determined that the apartment complex known as Evergreen Terrace I and Evergreen Terrace II (together, "Evergreen Terrace" or the "Property") is, *inter alia*, (1) extremely dilapidated, unsafe, substandard, unsanitary, crime-infested, a substantial threat to the health, welfare and safety of its residents, (2) a "blighted or slum area" under the Illinois Municipal Code, (3) interfering with the lawful use of nearby properties, and (4) diverting important public resources such as police and fire protection from nearby properties. It is undisputed that Evergreen Terrace is federally subsidized low-income housing, owned by private parties. The parties dispute, however, the extent to which various mortgage and regulatory agreements give HUD an interest in the Properties.

Joliet entered into good faith negotiation with the owners of Evergreen Terrace for the purpose of acquiring it, and authorizing the use of the city's

eminent domain powers to eliminate the blighted conditions existing there. Joliet and the owners of Evergreen Terrace, however, have been unable to reach an agreement on the price to be paid for the Property. Joliet therefore approved and adopted local Ordinance No. 15298 in order to begin eminent domain proceedings to acquire Evergreen Terrace. The City proposes to redevelop the Property to include a public park, a recreational area, and affordable housing.

B. Procedural History

On October 7, 2005, Joliet filed its Complaint for Condemnation in the Circuit Court of Will County, Illinois. Joliet purportedly filed this Complaint against all persons and entities having an interest in Evergreen Terrace. One of those Defendants was the Government National Mortgage Association ("GNMA"). GNMA is an agency of the United States government. On November 29, 2005, the United States Attorney for the Northern District of Illinois removed this case to the Northern District of Illinois. On February 27, 2006, the court granted Joliet's Motion to Voluntarily Dismiss GNMA, but denied Joliet's Motion to Remand, finding that HUD had a reversionary interest in the Property. The court granted Defendants' Rule 19(a) Motion to Join HUD as a Necessary Party on March 9, 2006.

On July 5, 2007, the Seventh Circuit entered an Opinion in a related case, *New West, L.P. v. City of Joliet*, 491 F.3d 717 (7th Cir. 2007). In this related case, the owners of Evergreen Terrace sued Joliet, alleging that

the Supremacy Clause prohibits the condemnation of the Property, that the City's activities related to the condemnation violate 42 U.S.C §§ 1982 and 1983, and that Joliet has violated the Fair Housing Act, 42 U.S.C. §§ 3601-19, by discouraging prospective minority tenants from living in Evergreen Terrace. *Id.* at 719. This court dismissed the case, but the Seventh Circuit reversed and remanded. In so doing, the Seventh Circuit indicated that this court must first resolve the condemnation suit before proceeding on the related case. *Id.* at 721. Writing for the Seventh Circuit, Chief Judge Easterbrook indicated that there was no federal impediment to Joliet's exercise of eminent domain in this case. He stressed that "[i]f Joliet thinks that a given parcel of land should be put to a public use, such as a park, and is willing to foot the bill, it is hard to see any obstacle in federal law." *Id.*

Following the Seventh Circuit's Opinion in the *New West* case, this court issued a Minute Order in the instant condemnation case in which it granted Defendants leave to refile their Motion for Summary Judgment. Defendants have since timely filed separate Motions for Summary Judgment, These Motions are fully briefed and before the court.[1]

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1. On August 3, 2007, the court issued an Opinion and Order granting Joliet's Motion for Judgment on the Pleadings with Respect to the Supremacy Clause Defense. Defendants' Summary Judgment arguments regarding the Supremacy Clause are therefore moot.

Appendix D

II. DISCUSSION

A. Standard of Decision

Summary judgment is permissible when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The nonmoving party cannot rest on the pleadings alone, but must identify specific facts, *see Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir.1993), that raise more than a mere scintilla of evidence to show a genuine triable issue of material fact. *See Murphy v. ITT Technical Services, Inc..*, 176 F.3d 934, 936 (7th Cir. 1999).

In deciding a motion for summary judgment, the court can only consider evidence that would be admissible at trial under the Federal Rules of Evidence. *See Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). The court views the record and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party, FED. R. CIV. P. 56(c); *see also Perdomo v. Browner*, 67 F.3d 140, 144 (7th Cir. 1995). "In the light most favorable" simply means that summary judgment is not appropriate if the court must make "a choice of inferences." *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *see also First Nat'l Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 280 (1968); *Wolf v. Buss (America) Inc.*, 77 F.3d 914, 922 (7th Cir. 1996). The choice between reasonable inferences from facts is a jury function. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

When the defendant moves for summary judgment, the court must view the record and all inferences in a light most favorable to the plaintiff. *Ameritech Benefit Plan Comm. v. Communication Workers of Am.*, 220 F.3d 814, 821 (7th Cir. 2000). However, the inferences construed in the plaintiff's favor must be drawn from specific facts identified in the record that support the plaintiff's position. *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 922-23 (7th Cir. 1994). Under this standard, "[c]onclusory allegations alone cannot defeat a motion for summary judgment." *Thomas v. Christ Hospital and Medical Center*, 328 F.3d 890, 892-93 (7th Cir. 2003) (citing *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 888-89 (1990)).

B. Defendants' Motions for Summary Judgment

In support of their Motions for Summary Judgment, Defendants collectively make the following assertions. Certain portions of the United States Constitution bar Joliet's condemnation of Evergreen Terrace: the Supremacy Clause, the Property Clause, and the Contracts Clause. The doctrine of intergovernmental immunity bars Joliet's condemnation of Evergreen Terrace. Joliet is equitably estopped from condemning Evergreen Terrace. The Complaint in this case is insufficient. The court has already determined that the Supremacy Clause does not preempt Joliet's attempt to condemn Evergreen Terrace. *See* Opinion and Order of August 3, 2007.

Appendix D

1. The Property Clause

The Property Clause of the United States Constitution provides, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST., art. IV, § 3, cl. 2. By its express terms, the Property Clause applies only to property owned by the United States. In this case, there is no question that Evergreen Terrace is privately owned, although the parties dispute the extent to which HUD has various contractual and reversionary interests in the Property.

Even if Evergreen Terrace were somehow owned by the United States, however, the Property Clause has never been interpreted as an impediment to the application of state law or regulations such as this condemnation action. "The Property Clause itself does not automatically conflict with all State regulation of federal land." *California Coastal Comm., v. Granite Rock Co.*, 480 U.S. 572, 580 (1987). "[F]ederal ownership of lands within a State does not withdraw those lands from the jurisdiction of the State." *Kleppe v. New Mexico*, 426 U.S. 529, 544 (1976) (citing *Wilson v. Cook*, 327 U.S. 474, 487-88 (1946) and *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650 (1930)). The Property Clause therefore has no bearing on this case.

2. The Contracts Clause

The Contracts Clause of the United States Constitution provides, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST., art. I, § 10, cl. 1. Courts do not interpret the Contracts Clause literally. *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 894 (7th Cir. 1998). "Even big, totally unpredictable impairments of the obligation of contracts can survive challenges under the contracts clause if they are responsive to economic emergencies . . . and even to considerably less exigent needs." *Id.* at 896 (internal citations omitted). If the state law at issue "serve[s] a legitimate public purpose such as remedying a general social or economic problem," and "the means chosen to accomplish this purpose are reasonable and necessary," the law does not run afoul of the Contracts Clause. *Buffalo Teachers Federation v. Tobe*, 464 F.3d 362, 368 (2nd Cir. 2006) (citing *Energy Reserves Group. Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983)).

At the summary judgment stage of this litigation, the court cannot say as a matter of law that Joliet's proposed condemnation of Evergreen Terrace serves no legitimate public purpose, and is not a reasonable means of remedying what Joliet perceives to be a "general social or economic problem." *See id.* The undisputed facts establish that Joliet plans to redevelop the Property to include various public benefits. Defendants' Contracts Clause assertions in support of their Motions for Summary Judgment therefore fail.

Appendix D

3. Intergovernmental Immunity

The concept of intergovernmental immunity has its roots on the Supremacy Clause of the United States Constitution.

> [T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared,

McCulloch v. Maryland, 17 U.S. 316, 435 (1819). The court has already determined that the Supremacy Clause is no bar to Joliet's attempt to condemn Evergreen Terrace. *See* Opinion and Order of August 3, 2007. Moreover, intergovernmental immunity has never been extended to private parties. It is clear that the Supremacy Clause forbids States from directly taxing or regulating the United States, *United States v. New Mexico*, 455 U.S. 720, 733 (1982), or "federally established instrumentalit[ies]," *First Agricultural Bank v. State Tax Commission*, 392 U.S. 339, 350 (1968). However, where State taxation or regulation merely "has an effect on the United States," intergovernmental immunity does not apply." *New Mexico*, 455 U.S. at 734. As the court has repeatedly explained, Evergreen Terrace is privately owned property. It is clearly not a "federally established instrumentality." The court

therefore cannot find, as a matter of law, that the doctrine of intergovernmental immunity prevents Joliet from proceeding with its condemnation action.

4. Equitable Estoppel

HUD asserts that Joliet is equitably estopped from finding that one of the Evergreen Terrace buildings is blighted. In making this assertion, HUD relies exclusively on language in a contract it has with Joliet which provides that Joliet is to inspect the building in question annually in order to assure that it is safe and clean. This argument is meritless. The power to condemn due to blight is not limited to specific buildings found to be in disrepair. "[T]he fact that there may be some sound buildings in the slum and blighted area is no defense to the proceedings. Property may be taken which, standing by itself, is unoffending, for the test is based on the condition of the area as a whole," *City of Chicago v. Barnes*, 195 N.E.2d 629, 631 (Ill. 1964) (citing *Berman v. Parker*, 348 U.S. 26, 34-35 (1954)). In this case, Joliet has determined that the Evergreen Terrace area as a whole is blighted. Whether the specific building in question is or is not blighted in not relevant.

5. Insufficiency of the Complaint

Finally, Defendants assert that the Complaint in this case is insufficient because Joliet has not named the tenants of Evergreen Terrace as Defendants, and because Joliet has not adequately described the interests it seeks to condemn. It is not clear to the court

why these issues were not brought in a motion to dismiss. In any event, these assertions are unavailing.

On January 31, 2008, the court granted the Evergreen Tenants' unopposed Motion to Intervene. The tenants of Evergreen Terrace are now Defendants in this case. Rule 71.1 of the Federal Rules of Civil Procedure (former Rule 71A) provides that, in a condemnation action, the Complaint must plainly state the "interests to be acquired." FED. R. CIV. P. 71.1(c)(2)(D). Paragraph 27 of Joliet's Amended Complaint states that it "seeks to acquire the full fee simple title to the Subject Property," It is difficult to discern how Joliet could have more adequately described the interests it seeks in Evergreen Terrace.

III. CONCLUSION

For the foregoing reasons, Defendants' Motions for Summary Judgment are denied.

IT IS SO ORDERED.

ENTER:

s/ Charles Ronald Norgle
CHARLES RONALD NORGLE, Judge
United States District Court

Dated: March 27, 2008

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DENYING MOTIONS FOR RECONSIDERATION FILED MARCH 18, 2008

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

05 C 6746

Charles R. Norgle, Judge

Date: 3/18/2008

City of Joliet

vs.

Mid-City Nat'l Bank, et al.

Defendants' Motions for Reconsideration [111] and [113] are denied.

STATEMENT

On August 3, 2007, the court issued an Opinion and Order granting Joliet's Motion for Judgment on the Pleadings with Respect to the Supremacy Clause Defense. On August 10, 2007, Defendants New West, New Bluff, et al., filed a Motion for Reconsideration. On that same date, Defendant United States Department of Housing and Urban Development also filed a Motion for Reconsideration. Neither Motion specifically references a Federal Rule of Civil Procedure. However,

since these Motions were filed within ten days of the court's August 3, 2007 Opinion and Order, the court construes the Motions as being brought pursuant to FRCP 59(c).

"The only grounds for a Rule 59(e) motion . . . are newly discovered evidence, an intervening change in the controlling law, and manifest error of law [or fact]." *Cosgrove v. Bartolotta*, 150 F.3d 729, 732 (7th Cir. 1998). Rule 59(e) "is not appropriately used to advance arguments or theories that could and should have been made before the district court rendered a judgment . . . or to present evidence that was available earlier." *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995) (citations omitted); *see also Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996). "The rule essentially enables a district court to correct its own errors, sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995). Whether to grant or deny a Rule 59(e) motion "is entrusted to the sound judgment of the district court." *Matter of Prince*, 85 F.3d 314, 324 (7th Cir. 1996).

In this case, the court finds that the Defendants have not presented newly discovered evidence or an intervening change in the law. *See Cosgrove*, 150 F.3d at 732. In addition, the court is not persuaded that it made a manifest error of law or fact. *Id.* Moreover, Defendants' 59 (e) Motions inappropriately repeat many of the same assertions made in earlier briefs. *See LB Credit Corp.*, 49 F.3d at 876. Defendants' Motions for Reconsideration are therefore denied.

APPENDIX F — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION FILED AUGUST 3, 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 05 C 6746

Honorable Charles R. Norgle

CITY OF JOLIET, an Illinois municipal corporation,

Plaintiff,

v.

MID-CITY NATIONAL BANK OF CHICAGO, as Successor Trustee to United of America Bank, et al.,

Defendants.

OPINION AND ORDER

CHARLES R. NORGLE, District Judge.

Before the court is Plaintiff City of Joliet's Motion for Judgment on the Pleadings with Respect to the Supremacy Clause Defense. For the following reasons, the Motion is granted.

Appendix F

I. BACKGROUND

A. Facts

Plaintiff City of Joliet, Illinois ("Joliet" or the "City") alleges the following facts in its Amended Complaint for Condemnation. Joliet is authorized under the Illinois Municipal Code to exercise the right of eminent domain to acquire real property, *inter alia*, (1) for the public welfare, (2) where acquisition of such property is necessary for the rehabilitation or redevelopment of any blighted or slum area, or (3) where acquisition of such property is necessary for the establishment of public parks, other public grounds, or recreational facilities. Joliet has determined that the apartment complex known as Evergreen Terrace I and Evergreen Terrace II (together, "Evergreen Terrace" or the "Property") is, *inter alia*, (1) extremely dilapidated, unsafe, substandard, unsanitary, crime-infested, a substantial threat to the health, welfare and safety of its residents, (2) a "blighted or slum area" under the Illinois Municipal Code, (3) interfering with the lawful use of nearby properties, and (4) diverting important public resources such as police and fire protection from nearby properties.

Joliet therefore entered into good faith negotiation with the owners of Evergreen Terrace for the purpose of acquiring it, and authorizing the use of the city's eminent domain powers to eliminate the blighted conditions existing there. Joliet and the owners of Evergreen Terrace, however, have been unable to reach

an agreement on the price to be paid for the Property. Joliet therefore approved and adopted local Ordinance No. 15298 in order to begin eminent domain proceedings to acquire Evergreen Terrace. The City proposes to redevelop the Property to include a public park, a recreational area, and affordable housing.

B. Procedural History

On October 7, 2005, Joliet filed its Complaint for Condemnation in the Circuit Court of Will County, Illinois. Joliet purportedly filed this Complaint against all persons and entities having an interest in Evergreen Terrace. One of those Defendants was the Government National Mortgage Association ("GNMA"). GNMA is an agency of the United States government. On November 29, 2005, the United States Attorney for the Northern District of Illinois removed this case to the Northern District of Illinois. On February 27, 2006, the court granted Joliet's Motion to Voluntarily Dismiss GNMA, but denied Joliet's Motion to Remand, finding that the United States Department of Housing and Urban Development ("HUD") had a reversionary interest in the Property. The court granted Defendants' Rule 19(a) Motion to Join HUD as a Necessary Party on March 9, 2006.

On July 5, 2007, the Seventh Circuit entered an Opinion in a related case, *New West. L.P. v. City of Joliet*, __ F.3d __, 06-3665 (7th Circuit July 5, 2007). In this related case, the owners of Evergreen Terrace sued Joliet, alleging that the Supremacy Clause prohibits the

condemnation of the Property, that the City's activities related to the condemnation violate 42 U.S.C. §§ 1982 and 1983, and that Joliet has violated the Fair Housing Act, 42 U.S.C. §§ 3601-19, by discouraging prospective minority tenants from living in Evergreen Terrace. *Id.*, slip. op. at 2. This court dismissed the case, but the Seventh Circuit reversed and remanded. In so doing, the Seventh Circuit indicated that this court must first resolve the condemnation suit before proceeding on the related case. *Id.*, slip. op. at 3. Writing for the Seventh Circuit, Chief Judge Easterbrook indicated that there was no federal impediment to Joliet's exercise of eminent domain in this case. "If Joliet thinks that a given parcel of land should be put to a public use, such as a park, and is willing to foot the bill, it is hard to see any obstacle in federal law." *Id.*, slip. op. at 6.

Following the Seventh Circuit's Opinion in the *New West* case, this court issued a Minute Order in the instant condemnation case in which it granted Joliet leave to refile its Motion for Summary Judgment. This Motion will become fully briefed on approximately September 10, 2007.

In the meantime, Joliet has filed the instant Motion for Judgment on the Pleadings with Respect to the Supremacy Clause Defense. Joliet has filed this Motion in response to HUD's third affirmative defense in this case, which asserts that "[t]he Supremacy Clause of the United States Constitution prohibits the City of Joliet from exercising eminent domain over or condemning the defendant Evergreen Terrace properties." In its Motion

for Judgment on the Pleadings, Joliet argues that federal law does not preempt the Illinois Municipal Code, or the City's local ordinance, regarding the eminent domain action against Evergreen Terrace. This Motion is fully briefed and before the court.

II. DISCUSSION

A. Standard of Decision

Federal Rule of Civil Procedure 12(h)(2) provides that "an objection of failure to state a legal defense to a claim may be made . . .by a motion for judgment on the pleadings." Federal Rule of Civil Procedure 12(c) states that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Plaintiff's Motion for Judgment on the Pleadings with Respect to the Supremacy Clause Defense is appropriately and timely presented to the court.

1. Preemption

The Supremacy Clause of the United States Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land." U.S. CONST., art. VI, cl.2. This Clause does not create any federal rights; instead, it " 'secures federal rights by according them priority whenever they come in conflict with state law.' " *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107 (1989) (quoting *Chapman*

v. Houston Welfare Rights Org., 441 U.S. 600, 613 (1979)). The Supremacy Clause therefore "support[s] three ways in which federal law can preempt state and local law: express preemption, conflict (or implied) preemption, and field (or complete) preemption." *Hoagland v. Town of Clear Lake*, 415 F.3d 693, 696 (7th Cir. 2005). The only type of preemption at issue in this case, conflict preemption, occurs where "it would be impossible for a party to comply with both local and federal requirements or where local law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)).

Courts are to presume that " 'Congress does not intend to supplant state law,' This is particularly true where a party claims that federal law bars state action in areas of traditional state regulation . . . ." *Frank Bros., Inc. v. Wis. DOT*, 409 F.3d 880, 885 (7th Cir. 2005) (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995)); *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 432 (2002) ("we start with the assumption that the historic police powers of the States were not to be superceded by [a] Federal Act unless that was the clear and manifest purpose of Congress.") (internal quotation marks and citation omitted). The burden therefore falls on the party asserting preemption to demonstrate that Congress clearly intended to override whatever state law is at issue. *See In re Ocwen Federal Bank FSB Mortgage Servicing Litgation*, MDL No. 1604, Lead Case No. 04 C 2714, 2006 U.S. Dist. LEXIS 21715 (N.D. Ill. March 22, 2006).

Appendix F

2. Eminent Domain

It is well-established law that municipalities may use eminent domain procedures to condemn and take private property for a legitimate public purpose. *Kelo v. City of New London*, 545 U.S. 469 (2005) (holding that a city's carefully considered redevelopment plan was not unconstitutional, even where property would be taken from private parties and given to other private parties); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (holding that a Hawaii statute under which property was taken from private landowners and transferred to lessees, in order to eliminate the "social and economic evils of land oligopoly" met the standards of a valid public use); *Berman v. Parker*, 348 U.S. 26 (1954) (upholding a redevelopment plan targeting a blighted area of Washington, D.C.). It is also well-established that when municipalities exercise the power of eminent domain, "the government must pay the owner just compensation, which is determined to be the property's fair market value." *Shaikh v. City of Chicago*, 341 F.3d 627, 632 (7th Cir. 2003) (citing *United States v. Miller*, 317 U.S. 369, 373-74 (1943); *United States v. 58.16 Acres of Land*, 478 F.2d 1055, 1058 (7th Cir. 1973)).

In adjudicating takings cases, the Supreme Court has long deferred to the judgment of local legislatures as to whether a particular taking serves a "public purpose." *Kelo*, 545 U.S. at 480.

> We do not sit to determine whether a particular housing project is or is not

> desirable. The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Berman, 348 U.S. at 33. The *Kelo* court reaffirmed *Berman's* "deferential approach to legislative judgments in the field," and noted that the Supreme Court's "earliest cases in particular embodied a strong sense of federalism, emphasizing the great respect that we owe to state legislatures and state courts in discerning local public needs." *Kelo*, 545 U.S. at 482 (citing *Hairston v. Danville & Western R. Co.*, 208 U.S. 598, 606-07 (1908)); *see also National Ass'n of Regulatory Utility v. F.E.R.C.*, 475 F.3d 1277, 1287 (D.C. Cir. 2007) ("Courts have long recognized that eminent domain is at the very core of state sovereignty."). The court will therefore adopt a "deferential approach" to the decisions of the local legislature as it analyzes the issues specific to the instant motion, as well as issues relevant to this entire case.

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B. Plaintiff's Motion for Partial Judgment on the Pleadings

Defendants, with the exception of HUD, have filed a joint brief in opposition to Plaintiff's Motion. HUD, represented by the United States Attorney's office, has filed a separate brief in opposition to this Motion. Defendants Mid-City National Bank of Chicago, et al., argue that the Supremacy Clause prohibits Joliet from condemning Evergreen Terrace because the federal government has a substantial interest in the Property, and the State laws and the local ordinance permitting the condemnation are preempted by HUD regulations, Section 8 of the United States Housing Act, and the Multifamily Assisted Housing Reform and Affordability Act ("MAHRA"). HUD asserts that Joliet's eminent domain action, carried out pursuant to state law, is preempted by HUD regulations, MAHRA, as well as the Property Clause and the Contract Clause of the United States Constitution.[1] Defendants also argue that Judge Easterbrook's statement, "[i]f Joliet thinks that a given parcel of land should be put to a public use, such as a park, and is willing to foot the bill, it is hard to see any obstacle in federal law," *New West*, slip. op. at 6, is mere dictum, and should therefore have no bearing on this court's adjudication of the instant motion.

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1. The court notes that the instant Motion references only the Supremacy Clause and related preemption issues. Issues regarding the Property and Contract Clauses are not properly before the court at this point.

Appendix F

Defendants first argument, that the federal government's interest in Evergreen Terrace prohibits Joliet from exercising eminent domain over the Property, stems from HUD's mortgage and reversionary interests in Evergreen Terrace. In HUD's answer to the Amended Complaint, HUD explains that

> [i]n addition to HUD being a mortgage holder on Evergreen Terrace I and II, the incorporated regulatory agreements provide that in the event of a HUD-non-authorized transfer of the defendant properties, such as the subject condemnation action, the HUD Secretary would have the right to take possession of the properties, as well as foreclose on the mortgages.

It is undisputed, however, that at present, Evergreen Terrace is privately owned property. Its owners have a voluntary contractual relationship with HUD which gives HUD the above described interests in the Property. HUD, however, does not own Evergreen Terrace. HUD's reliance on *Shaikh*, in which the Seventh Circuit observed that the City of Chicago could not pursue condemnation proceedings against HUD-owned property, is therefore misplaced. The owners of Evergreen Terrace are private parties. In *Shaikh*, the Seventh Circuit warned that a private party " 'who acquires or occupies land does so at the risk of being evicted by the exercise of the superior right of the government or its delegate to acquire his interest upon payment of just compensation.' " 341 F.3d at 631

(quoting *United States v. 16.92 Acres of Land*, 670 F.2d 1369, 1371 (7th Cir. 1982)). Moreover, "HUD's regulations implementing the § 8 program contemplate the possibility of the parcel's condemnation; they do not purport to forbid condemnations." *New West*, slip. op. at 6. HUD's mortgage and reversionary interest in Evergreen Terrace is thus not an impediment to Joliet's plan to exercise its power of eminent domain over the Property.

Defendants' arguments that federal statutes preempt Joliet's attempt to exercise its power of eminent domain over Evergreen Terrace are also unavailing. "New West contends that § 8 and the Fair Housing Act prevent condemnation of Evergreen Terrace, but it does not rely on any particular provision of that statute. Section 8 is a subsidy program, a carrot rather than a stick." *Id.* In other words, the § 8 program was designed to encourage private property owners to provide low-income housing—there is simply no basis on which to conclude that Congress intended for this program to also preempt local governments' use of their powers of eminent domain. *See Baker v. Property Investors of Conn.*, 338 F. Supp. 2d 321, 323 (D. Conn. 2004) ("Section 8 of the Housing Act 'aids low-income families in obtaining a decent place to live and . . . promotes economically mixed housing' . . . by providing federal subsidies to private building owners who are willing to rent to low-income families.") (internal citation omitted). In enacting MAHRA, Congress intended to, *inter alia*, "preserve low-income rental housing affordability and availability . . . streamline and

improve federally insured and assisted multifamily housing project oversight . . . [and] to resolve the problems affecting financially and physically troubled federally insured and assisted multifamily housing projects . . . ." MAHRA § 511(b); *see also Neighborhood Research Inst, v. Campus Ptnrs. for Cmty. Urban Dev.*, 212 F.R.D. 364, 366-67 (S.D. Ohio 2002). Once again, there is simply no basis on which to conclude that MAHRA was intended to preempt local municipalities' ability to exercise their powers of eminent domain.

Finally, it is arguable that Judge Easterbrook's observation that "it is hard to see any obstacle in federal law" to Joliet's condemnation of Evergreen Terrace is indeed *dictum proprium:* "[a] personal or individual [statement] that is given by the judge who delivers an opinion but that is not necessarily concurred in by the whole court and is not essential to the disposition." BLACK'S LAW DICTIONARY 485 (8th ed.2004). However, the court cannot presume that a statement by the Chief Judge of the Seventh Circuit Court of Appeals carries no weight simply because it may be dictum. To the contrary, in our hierarchical judicial system, a federal district court must take the observations of its appellate court very seriously, regardless of whether these observations are contained in the higher court's holdings, or are indeed simply dicta. "[A] federal district court is required to give great weight to the pronouncements of its Court of Appeals, even though those pronouncements appear by way of dictum . . . [W]e cannot presume that our Court of Appeals writes merely for intellectual exercise." *Pickett v. Prince*, 52 F. Supp.

2d 893, 904 (N.D. Ill. 1999) (internal quotation marks and citation omitted). The court has thoroughly considered the observations of Chief Judge Easterbrook and has independently reached the conclusion that they are correct. Moreover, it is not unusual for the Seventh Circuit to offer guidance to district courts or parties. Even where such guidance is not "essential to the disposition" of the case, a district court or party overlooks it at its peril. *See Blue Cross Blue Shield of Illinois v. Cruz*, No. 03-4170, slip op. at 8 (7th Cir. July 27, 2007). The court therefore declines Defendants' invitation to ignore Judge Easterbrook's observation regarding the lack of any federal impediment to Joliet's condemnation of Evergreen Terrace.

III. CONCLUSION

As the court has noted, it is Defendants' burden to demonstrate to the court that federal law preempts Joliet's attempt to condemn and redevelop Evergreen Terrace. Defendants have failed to meet this burden. Plaintiff City of Joliet's Motion for Judgment on the Pleadings with Respect to the Supremacy Clause Defense is therefore granted.

IT IS SO ORDERED.

ENTER:

s/ Charles Ronald Norgle
CHARLES RONALD NORGLE, Judge
United States District Court

Dated: August 3, 2007

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 14, 2009

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 14, 2009

Before

FRANK H. EASTERBROOK, *Chief Judge*

ANN CLAIR WILLIAMS, *Chief Judge*

DIANE S. SYKES, *Chief Judge*

Nos. 08-3032 & 08-3033

CITY OF JOLIET, ILLINOIS,

Plaintiff-Appellee,

v.

NEW WEST, L.P., and NEW BLUFF, L.P.,

Defendants-Appellants.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND EVERGREEN TERRACE TENANTS,

Intervening Defendants-Appellants.

Appendix G

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 05 C 6746
Charles R. Norgle, Sr., *Judge.*

Order

Defendants-Appellants and Intervening Defendants-Appellants filed three separate petitions for rehearing and rehearing en banc on May 26, 2009. No judge in regular active service has requested a vote on the petitions for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petitions for rehearing are therefore DENIED.

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* Judge Flaum did ot participate in the consideration of these petitions.

APPENDIX H — MAHRA, 42 U.S.C. § 1437 NOTE

Multifamily Assisted Housing Reform and Affordability Act ("MAHRA"), Pub. L. No. 105-65, Title V, 111 Stat. 1384 (42 U.S.C. § 1437f note)

Sec. 510. <*12 USC 1701* note> SHORT TITLE.

This title may be cited as the "Multifamily Assisted Housing Reform and Affordability Act of 1997".

Subtitle A--FHA-Insured Multifamily Housing Mortgage and Housing Assistance Restructuring

Sec. 511. <*42 USC 1437f* note> FINDINGS AND PURPOSES.

(a) Findings.—Congress finds that—

(1) there exists throughout the Nation a need for decent, safe, and affordable housing;

(2) as of the date of enactment of this Act, it is estimated that—

(A) the insured multifamily housing portfolio of the Federal Housing Administration consists of 14,000 rental properties, with an aggregate unpaid principal mortgage balance of $ 38,000,000,000; and

(B) approximately 10,000 of these properties contain housing units that are assisted with project-based rental assistance under section 8 of the United States Housing Act of 1937;

(3) FHA-insured multifamily rental properties are a major Federal investment, providing affordable rental housing to an estimated 2,000,000 low- and very low-income families;

(4) approximately 1,600,000 of these families live in dwelling units that are assisted with project-based rental assistance under section 8 of the United States Housing Act of 1937;

(5) a substantial number of housing units receiving project-based assistance have rents that are higher than the rents of comparable, unassisted rental units in the same housing rental market;

(6) many of the contracts for project-based assistance will expire during the several years following the date of enactment of this Act;

(7) it is estimated that—

(A) if no changes in the terms and conditions of the contracts for project-based assistance are made before fiscal year 2000, the cost of renewing all expiring rental assistance contracts under section 8 of the United States Housing Act of 1937 for both project-based and tenant-based rental assistance will increase from approximately $ 3,600,000,000 in fiscal year 1997 to over $ 14,300,000,000 by fiscal year 2000 and some $ 22,400,000,000 in fiscal year 2006;

(B) of those renewal amounts, the cost of renewing project-based assistance will increase from $ 1,200,000,000 in fiscal year 1997 to almost $ 7,400,000,000 by fiscal year 2006; and

(C) without changes in the manner in which project-based rental assistance is provided, renewals of expiring contracts for project-based rental assistance will require an increasingly larger portion of the discretionary budget authority of the Department of Housing and Urban Development in each subsequent fiscal year for the foreseeable future;

(8) absent new budget authority for the renewal of expiring rental contracts for project-based assistance, many of the FHA-insured multifamily housing projects that are assisted with project-based assistance are likely to default on their FHA-insured mortgage payments, resulting in substantial claims to the FHA General Insurance Fund and Special Risk Insurance Fund;

(9) more than 15 percent of federally assisted multifamily housing projects are physically or financially distressed, including a number which suffer from mismanagement;

(10) due to Federal budget constraints, the downsizing of the Department of Housing and Urban Development, and diminished administrative capacity, the Department lacks the ability to ensure the continued economic and physical well-being of the stock of federally insured and assisted multifamily housing projects;

(11) the economic, physical, and management problems facing the stock of federally insured and assisted multifamily housing projects will be best served by reforms that—

(A) reduce the cost of Federal rental assistance, including project-based assistance, to these projects by reducing the debt service and operating costs of these projects while retaining the low-income affordability and availability of this housing;

(B) address physical and economic distress of this housing and the failure of some project managers and owners of projects to comply with management and ownership rules and requirements; and

(C) transfer and share many of the loan and contract administration functions and responsibilities of the Secretary to and with capable State, local, and other entities; and

(12) the authority and duties of the Secretary, not including the control by the Secretary of applicable accounts in the Treasury of the United States, may be delegated to State, local or other entities at the discretion of the Secretary, to the extent the Secretary determines, and for the purpose of carrying out this Act, so that the Secretary has the discretion to be relieved of processing and approving any document or action required by these reforms.

Appendix H

(b) Purposes.—Consistent with the purposes and requirements of the Government Performance and Results Act of 1993, the purposes of this subtitle are—

(1) to preserve low-income rental housing affordability and availability while reducing the long-term costs of project-based assistance;

(2) to reform the design and operation of Federal rental housing assistance programs, administered by the Secretary, to promote greater multifamily housing project operating and cost efficiencies;

(3) to encourage owners of eligible multifamily housing projects to restructure their FHA-insured mortgages and project-based assistance contracts in a manner that is consistent with this subtitle before the year in which the contract expires;

(4) to reduce the cost of insurance claims under the National Housing Act related to mortgages insured by the Secretary and used to finance eligible multifamily housing projects;

(5) to streamline and improve federally insured and assisted multifamily housing project oversight and administration;

(6) to resolve the problems affecting financially and physically troubled federally insured and assisted multifamily housing projects through cooperation with residents, owners, State and local governments, and other interested entities and individuals;

(7) to protect the interest of project owners and managers, because they are partners of the Federal Government in meeting the affordable housing needs of the Nation through the section 8 rental housing assistance program;

(8) to protect the interest of tenants residing in the multifamily housing projects at the time of the restructuring for the housing; and

(9) to grant additional enforcement tools to use against those who violate agreements and program requirements, in order to ensure that the public interest is safeguarded and that Federal multifamily housing programs serve their intended purposes.

Sec. 512. <*42 USC 1437f* note> DEFINITIONS.

In this subtitle:

(1) Comparable properties. —The term "comparable properties" means properties in the same market areas, where practicable, that—

(A) are similar to the eligible multifamily housing project as to neighborhood (including risk of crime), type of location, access, street appeal, age, property size, apartment mix, physical configuration, property and unit amenities, utilities, and other relevant characteristics; and

(B) are not receiving project-based assistance.

(2) Eligible multifamily housing project.— The term "eligible multifamily housing project" means a property consisting of more than 4 dwelling units—

(A) with rents that, on an average per unit or per room basis, exceed the rent of comparable properties in the same market area, determined in accordance with guidelines established by the Secretary;

(B) that is covered in whole or in part by a contract for project-based assistance under—

(i) the new construction or substantial rehabilitation program under section 8(b)(2) of the United States Housing Act of 1937 (as in effect before October 1, 1983);

(ii) the property disposition program under section 8(b) of the United States Housing Act of 1937;

(iii) the moderate rehabilitation program under section 8(e)(2) of the United States Housing Act of 1937;

(iv) the loan management assistance program under section 8 of the United States Housing Act of 1937;

(v) section 23 of the United States Housing Act of 1937 (as in effect before January 1, 1975);

Appendix H

(vi) the rent supplement program under section 101 of the Housing and Urban Development Act of 1965; or

(vii) section 8 of the United States Housing Act of 1937, following conversion from assistance under section 101 of the Housing and Urban Development Act of 1965; and

(C) financed by a mortgage insured or held by the Secretary under the National Housing Act.

(3) Expiring contract.— The term "expiring contract" means a project-based assistance contract attached to an eligible multifamily housing project which, under the terms of the contract, will expire.

(4) Expiration date.— The term "expiration date" means the date on which an expiring contract expires.

(5) Fair market rent.— The term "fair market rent" means the fair market rental established under section 8(c) of the United States Housing Act of 1937.

(6) Low-income families.— The term "low-income families" has the same meaning as provided under section 3(b)(2) of the United States Housing Act of 1937.

(7) Mortgage restructuring and rental assistance sufficiency plan.— The term "mortgage restructuring and rental assistance sufficiency plan" means the plan as provided under section 514.

(8) Nonprofit organization.— The term "nonprofit organization" means any private nonprofit organization that—

(A) is organized under State or local laws;

(B) has no part of its net earnings inuring to the benefit of any member, founder, contributor, or individual; and

(C) has a long-term record of service in providing or financing quality affordable housing for low-income families through relationships with public entities.

(9) Portfolio restructuring agreement.— The term "portfolio restructuring agreement" means the agreement entered into between the Secretary and a participating administrative entity, as provided under section 513.

(10) Participating administrative entity.— The term "participating administrative entity" means a public agency (including a State housing finance agency or a local housing agency), a nonprofit organization, or any other entity (including a law firm or an accounting firm) or a combination of such entities, that meets the requirements under section 513(b).

(11) Project-based assistance.— The term "project-based assistance" means rental assistance described in paragraph (2)(B) of this section that is attached to a multifamily housing project.

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(12) Renewal.— The term "renewal" means the replacement of an expiring Federal rental contract with a new contract under section 8 of the United States Housing Act of 1937, consistent with the requirements of this subtitle.

(13) Secretary.— The term "Secretary" means the Secretary of Housing and Urban Development.

(14) State.— The term "State" has the same meaning as in section 104 of the Cranston-Gonzalez National Affordable Housing Act.

(15) Tenant-based assistance.— The term "tenant-based assistance" has the same meaning as in section 8(f) of the United States Housing Act of 1937.

(16) Unit of general local government.— The term "unit of general local government" has the same meaning as in section 104 of the Cranston-Gonzalez National Affordable Housing Act.

(17) Very low-income family.— The term "very low-income family" has the same meaning as in section 3(b) of the United States Housing Act of 1937.

(18) Qualified mortgagee.— The term "qualified mortgagee" means an entity approved by the Secretary that is capable of servicing, as well as originating, FHA-insured mortgages, and that—

(A) is not suspended or debarred by the Secretary;

(B) is not suspended or on probation imposed by the Mortgagee Review Board; and

(C) is not in default under any Government National Mortgage Association obligation.

Sec. 513. <*42 USC 1437f* note> AUTHORITY OF PARTICIPATING ADMINISTRATIVE ENTITIES.

(a) Participating Administrative Entities.—

(1) In general.— Subject to subsection (b)(3), the Secretary shall enter into portfolio restructuring agreements with participating administrative entities for the implementation of mortgage restructuring and rental assistance sufficiency plans to restructure multifamily housing mortgages insured or held by the Secretary under the National Housing Act, in order to—

(A) reduce the costs of expiring contracts for assistance under section 8 of the United States Housing Act of 1937;

(B) address financially and physically troubled projects; and

(C) correct management and ownership deficiencies.

(2) Portfolio restructuring agreements.— Each portfolio restructuring agreement entered into under this subsection shall—

(A) be a cooperative agreement to establish the obligations and requirements between the Secretary and the participating administrative entity;

(B) identify the eligible multifamily housing projects or groups of projects for which the participating administrative entity is responsible for assisting in developing and implementing approved mortgage restructuring and rental assistance sufficiency plans under section 514;

(C) require the participating administrative entity to review and certify to the accuracy and completeness of the evaluation of rehabilitation needs required under section 514(e)(3) for each eligible multifamily housing project included in the portfolio restructuring agreement, in accordance with regulations promulgated by the Secretary;

(D) identify the responsibilities of both the participating administrative entity and the Secretary in implementing a mortgage restructuring and rental assistance sufficiency plan, including any actions proposed to be taken under section 516 or 517;

(E) require each mortgage restructuring and rental assistance sufficiency plan to be prepared in accordance with the requirements of section 514 for each eligible multifamily housing project;

(F) include other requirements established by the Secretary, including a right of the Secretary to terminate the contract immediately for failure of the participating administrative entity to comply with any applicable requirement;

(G) if the participating administrative entity is a State housing finance agency or a local housing agency, indemnify the participating administrative entity against lawsuits and penalties for actions taken pursuant to the agreement, excluding actions involving willful misconduct or negligence;

(H) include compensation for all reasonable expenses incurred by the participating administrative entity necessary to perform its duties under this subtitle; and

(I) include, where appropriate, incentive agreements with the participating administrative entity to reward superior performance in meeting the purposes of this Act.

(b) Selection of Participating Administrative Entity.—

(1) Selection criteria.— The Secretary shall select a participating administrative entity based on whether, in the determination of the Secretary, the participating administrative entity—

(A) has demonstrated experience in working directly with residents of low-income housing projects and with tenants and other community-based organizations;

(B) has demonstrated experience with and capacity for multifamily restructuring and multifamily financing (which may include risk-sharing arrangements and restructuring eligible multifamily housing properties under the fiscal year 1997 Federal Housing Administration multifamily housing demonstration program);

(C) has a history of stable, financially sound, and responsible administrative performance (which may include the management of affordable low-income rental housing);

(D) has demonstrated financial strength in terms of asset quality, capital adequacy, and liquidity;

(E) has demonstrated that it will carry out the specific transactions and other responsibilities under this subtitle in a timely, efficient, and cost-effective manner; and

(F) meets other criteria, as determined by the Secretary.

(2) Selection.— If more than 1 interested entity meets the qualifications and selection criteria for a participating administrative entity, the Secretary may select the entity that demonstrates, as determined by the Secretary, that it will—

(A) provide the most timely, efficient, and cost-effective—

(i) restructuring of the mortgages covered by the portfolio restructuring agreement; and

(ii) administration of the section 8 project-based assistance contract, if applicable; and

(B) protect the public interest (including the long-term provision of decent low-income affordable rental housing and protection of residents, communities, and the American taxpayer).

(3) Partnerships.— For the purposes of any participating administrative entity applying under this subsection, participating administrative entities are encouraged to develop partnerships with each other and with nonprofit organizations, if such partnerships will further the participating administrative entity's ability to meet the purposes of this Act.

(4) Alternative administrators.— With respect to any eligible multifamily housing project for which a participating administrative entity is unavailable, or should not be selected to carry out the requirements of

this subtitle with respect to that multifamily housing project for reasons relating to the selection criteria under paragraph (1), the Secretary shall—

(A) carry out the requirements of this subtitle with respect to that eligible multifamily housing project; or

(B) contract with other qualified entities that meet the requirements of paragraph (1) to provide the authority to carry out all or a portion of the requirements of this subtitle with respect to that eligible multifamily housing project.

(5) Priority for public agencies as participating administrative entities.— The Secretary shall provide a reasonable period during which the Secretary will consider proposals only from State housing finance agencies or local housing agencies, and the Secretary shall select such an agency without considering other applicants if the Secretary determines that the agency is qualified. The period shall be of sufficient duration for the Secretary to determine whether any State housing finance agencies or local housing agencies are interested and qualified. Not later than the end of the period, the Secretary shall notify the State housing finance agency or the local housing agency regarding the status of the proposal and, if the proposal is rejected, the reasons for the rejection and an opportunity for the applicant to respond.

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(6) State and local portfolio requirements.—

(A) In general.—If the housing finance agency of a State is selected as the participating administrative entity, that agency shall be responsible for such eligible multifamily housing projects in that State as may be agreed upon by the participating administrative entity and the Secretary. If a local housing agency is selected as the participating administrative entity, that agency shall be responsible for such eligible multifamily housing projects in the jurisdiction of the agency as may be agreed upon by the participating administrative entity and the Secretary.

(B) Nondelegation.—Except with the prior approval of the Secretary, a participating administrative entity may not delegate or transfer responsibilities and functions under this subtitle to 1 or more entities.

(7) Private entity requirements.—

(A) In general.—If a for-profit entity is selected as the participating administrative entity, that entity shall be required to enter into a partnership with a public purpose entity (including the Department).

(B) Prohibition.—No private entity shall share, participate in, or otherwise benefit from any equity created, received, or restructured as a result of the portfolio restructuring agreement.

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Sec. 514. *<42 USC 1437f* note> MORTGAGE RESTRUCTURING AND RENTAL ASSISTANCE SUFFICIENCY PLAN.

(a) In General.—

(1) Development of procedures and requirements.— The Secretary shall develop procedures and requirements for the submission of a mortgage restructuring and rental assistance sufficiency plan for each eligible multifamily housing project with an expiring contract.

(2) Terms and conditions.— Each mortgage restructuring and rental assistance sufficiency plan submitted under this subsection shall be developed by the participating administrative entity, in cooperation with an owner of an eligible multifamily housing project and any servicer for the mortgage that is a qualified mortgagee, under such terms and conditions as the Secretary shall require.

(3) Consolidation.— Mortgage restructuring and rental assistance sufficiency plans submitted under this subsection may be consolidated as part of an overall strategy for more than 1 property.

(b) Notice Requirements.—The Secretary shall establish notice procedures and hearing requirements for tenants and owners concerning the dates for the expiration of project-based assistance contracts for any eligible multifamily housing project.

(c) Extension of Contract Term.—Subject to agreement by a project owner, the Secretary may extend the term of any expiring contract or provide a section 8 contract with rent levels set in accordance with subsection (g) for a period sufficient to facilitate the implementation of a mortgage restructuring and rental assistance sufficiency plan, as determined by the Secretary.

(d) Tenant Rent Protection.—If the owner of a project with an expiring Federal rental assistance contract does not agree to extend the contract, not less than 12 months prior to terminating the contract, the project owner shall provide written notice to the Secretary and the tenants and the Secretary shall make tenant-based assistance available to tenants residing in units assisted under the expiring contract at the time of expiration.

(e) Mortgage Restructuring and Rental Assistance Sufficiency Plan.—Each mortgage restructuring and rental assistance sufficiency plan shall—

(1) except as otherwise provided, restructure the project-based assistance rents for the eligible multifamily housing project in a manner consistent with subsection (g), or provide for tenant-based assistance in accordance with section 515;

(2) allow for rent adjustments by applying an operating cost adjustment factor established under guidelines established by the Secretary;

(3) require the owner or purchaser of an eligible multifamily housing project to evaluate the rehabilitation needs of the project, in accordance with regulations of the Secretary, and notify the participating administrative entity of the rehabilitation needs;

(4) require the owner or purchaser of the project to provide or contract for competent management of the project;

(5) require the owner or purchaser of the project to take such actions as may be necessary to rehabilitate, maintain adequate reserves, and to maintain the project in decent and safe condition, based on housing quality standards established by—

(A) the Secretary; or

(B) local housing codes or codes adopted by public housing agencies that—

(i) meet or exceed housing quality standards established by the Secretary; and

(ii) do not severely restrict housing choice;

(6) require the owner or purchaser of the project to maintain affordability and use restrictions in accordance with regulations promulgated by the Secretary, for a term of not less than 30 years which restrictions shall be—

(A) contained in a legally enforceable document recorded in the appropriate records; and

(B) consistent with the long-term physical and financial viability and character of the project as affordable housing;

(7) include a certification by the participating administrative entity that the restructuring meets subsidy layering requirements established by the Secretary by regulation for purposes of this subtitle;

(8) require the owner or purchaser of the project to meet such other requirements as the Secretary determines to be appropriate; and

(9) prohibit the owner from refusing to lease a reasonable number of units to holders of certificates and vouchers under section 8 of the United States Housing Act of 1937 because of the status of the prospective tenants as certificate and voucher holders.

(f) Tenant and Other Participation and Capacity Building.—

(1) Procedures.—

(A) In general.—The Secretary shall establish procedures to provide an opportunity for tenants of the project, residents of the neighborhood, the local government, and other affected parties to participate effectively and on a timely basis in the restructuring process established by this subtitle.

(B) Coverage.—These procedures shall take into account the need to provide tenants of the project, residents of the neighborhood, the local government, and other affected parties timely notice of proposed restructuring actions and appropriate access to relevant information about restructuring activities. To the extent practicable and consistent with the need to accomplish project restructuring in an efficient manner, the procedures shall give all such parties an opportunity to provide comments to the participating administrative entity in writing, in meetings, or in another appropriate manner (which comments shall be taken into consideration by the participating administrative entity).

(2) Required consultation.— The procedures developed pursuant to paragraph (1) shall require consultation with tenants of the project, residents of the neighborhood, the local government, and other affected parties, in connection with at least the following:

(A) the mortgage restructuring and rental assistance sufficiency plan;

(B) any proposed transfer of the project; and

(C) the rental assistance assessment plan pursuant to section 515(c).

(3) Funding.—

(A) In general.—The Secretary may provide not more than $ 10,000,000 annually in funding from which

the Secretary may make obligations to tenant groups, nonprofit organizations, and public entities for building the capacity of tenant organizations, for technical assistance in furthering any of the purposes of this subtitle (including transfer of developments to new owners) and for tenant services, from those amounts made available under appropriations Acts for implementing this subtitle or previously made available for technical assistance in connection with the preservation of affordable rental housing for low-income persons.

(B) Manner of providing.—Notwithstanding any other provision of law restricting the use of preservation technical assistance funds, the Secretary may provide any funds made available under subparagraph (A) through existing technical assistance programs pursuant to any other Federal law, including the Low-Income Housing Preservation and Resident Homeownership Act of 1990 and the Multifamily Property Disposition Reform Act of 1994, or through any other means that the Secretary considers consistent with the purposes of this subtitle, without regard to any set-aside requirement otherwise applicable to those funds.

(C) Prohibition.—None of the funds made available under subparagraph (A) may be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose,

by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation.

(g) Rent Levels.—

(1) In general.— Except as provided in paragraph (2), each mortgage restructuring and rental assistance sufficiency plan pursuant to the terms, conditions, and requirements of this subtitle shall establish for units assisted with project-based assistance in eligible multifamily housing projects adjusted rent levels that—

(A) are equivalent to rents derived from comparable properties, if—

(i) the participating administrative entity makes the rent determination within a reasonable period of time; and

(ii) the market rent determination is based on not less than 2 comparable properties; or

(B) if those rents cannot be determined, are equal to 90 percent of the fair market rents for the relevant market area.

(2) Exceptions.—

(A) In general.—A contract under this section may include rent levels that exceed the rent level described

in paragraph (1) at rent levels that do not exceed 120 percent of the fair market rent for the market area (except that the Secretary may waive this limit for not more than five percent of all units subject to restructured mortgages in any fiscal year, based on a finding of special need), if the participating administrative entity—

(i) determines that the housing needs of the tenants and the community cannot be adequately addressed through implementation of the rent limitation required to be established through a mortgage restructuring and rental assistance sufficiency plan under paragraph (1); and

(ii) follows the procedures under paragraph (3).

(B) Exception rents.—In any fiscal year, a participating administrative entity may approve exception rents on not more than 20 percent of all units covered by the portfolio restructuring agreement with expiring contracts in that fiscal year, except that the Secretary may waive this ceiling upon a finding of special need.

(3) Rent levels for exception projects.— For purposes of this section, a project eligible for an exception rent shall receive a rent calculated on the actual and projected costs of operating the project, at a level that provides income sufficient to support a budget-based rent that consists of—

(A) the debt service of the project;

(B) the operating expenses of the project, as determined by the participating administrative entity, including—

(i) contributions to adequate reserves;

(ii) the costs of maintenance and necessary rehabilitation; and

(iii) other eligible costs permitted under section 8 of the United States Housing Act of 1937;

(C) an adequate allowance for potential operating losses due to vacancies and failure to collect rents, as determined by the participating administrative entity;

(D) an allowance for a reasonable rate of return to the owner or purchaser of the project, as determined by the participating administrative entity, which may be established to provide incentives for owners or purchasers to meet benchmarks of quality for management and housing quality; and

(E) other expenses determined by the participating administrative entity to be necessary for the operation of the project.

(h) Exemptions From Restructuring.—The following categories of projects shall not be covered by a mortgage restructuring and rental assistance sufficiency plan if—

(1) the primary financing or mortgage insurance for the multifamily housing project that is covered by that expiring contract was provided by a unit of State government or a unit of general local government (or an agency or instrumentality of a unit of a State government or unit of general local government);

(2) the project is a project financed under section 202 of the Housing Act of 1959 or section 515 of the Housing Act of 1949; or

(3) the project has an expiring contract under section 8 of the United States Housing Act of 1937 entered into pursuant to section 441 of the Stewart B. McKinney Homeless Assistance Act.

Sec. 515. <*42 USC 1437f* note> SECTION 8 RENEWALS AND LONG-TERM AFFORDABILITY COMMITMENT BY OWNER OF PROJECT.

(a) Section 8 Renewals of Restructured Projects.—

(1) Project-based assistance.— Subject to the availability of amounts provided in advance in appropriations Acts, and to the control of the Secretary of applicable accounts in the Treasury of the United States, with respect to an expiring section 8 contract on an eligible multifamily housing project to be renewed

with project-based assistance (based on a determination under subsection (c)), the Secretary shall enter into contracts with participating administrative entities pursuant to which the participating administrative entity shall offer to renew or extend the contract, or the Secretary shall offer to renew such contract, and the owner of the project shall accept the offer, if the initial renewal is in accordance with the terms and conditions specified in the mortgage restructuring and rental assistance sufficiency plan and the rental assistance assessment plan.

(2) Tenant-based assistance.— Subject to the availability of amounts provided in advance in appropriations Acts and to the control of the Secretary of applicable accounts in the Treasury of the United States, with respect to an expiring section 8 contract on an eligible multifamily housing project to be renewed with tenant-based assistance (based on a determination under subsection (c)), the Secretary shall enter into contracts with participating administrative entities pursuant to which the participating administrative entity shall provide for the renewal of section 8 assistance on an eligible multifamily housing project with tenant-based assistance, or the Secretary shall provide for such renewal, in accordance with the terms and conditions specified in the mortgage restructuring and rental assistance sufficiency plan and the rental assistance assessment plan.

(b) Required Commitment.—After the initial renewal of a section 8 contract pursuant to this section,

the owner shall accept each offer made pursuant to subsection (a) to renew the contract, for the term of the affordability and use restrictions required by section 514(e)(6), if the offer to renew is on terms and conditions specified in the mortgage restructuring and rental assistance sufficiency plan.

(c) Determination of Whether To Renew With Project-Based or Tenant-Based Assistance.—

(1) Mandatory renewal of project-based assistance.— Section 8 assistance shall be renewed with project-based assistance, if—

(A) the project is located in an area in which the participating administrative entity determines, based on housing market indicators, such as low vacancy rates or high absorption rates, that there is not adequate available and affordable housing or that the tenants of the project would not be able to locate suitable units or use the tenant-based assistance successfully;

(B) a predominant number of the units in the project are occupied by elderly families, disabled families, or elderly and disabled families;

(C) the project is held by a nonprofit cooperative ownership housing corporation or nonprofit cooperative housing trust.

(2) Rental assistance assessment plan.——

(A) In general.—With respect to any project that is not described in paragraph (1), the participating administrative entity shall, after consultation with the owner of the project, develop a rental assistance assessment plan to determine whether to renew assistance for the project with tenant-based assistance or project-based assistance.

(B) Rental assistance assessment plan requirements.—Each rental assistance assessment plan developed under this paragraph shall include an assessment of the impact of converting to tenant-based assistance and the impact of extending project-based assistance on—

(i) the ability of the tenants to find adequate, available, decent, comparable, and affordable housing in the local market;

(ii) the types of tenants residing in the project (such as elderly families, disabled families, large families, and cooperative homeowners);

(iii) the local housing needs identified in the comprehensive housing affordability strategy, and local market vacancy trends;

(iv) the cost of providing assistance, comparing the applicable payment standard to the project's adjusted rent levels determined under section 514(g);

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(v) the long-term financial stability of the project;

(vi) the ability of residents to make reasonable choices about their individual living situations;

(vii) the quality of the neighborhood in which the tenants would reside; and

(viii) the project's ability to compete in the marketplace.

(C) Reports to director.—Each participating administrative entity shall report regularly to the Director as defined in subtitle D, as the Director shall require, identifying—

(i) each eligible multifamily housing project for which the entity has developed a rental assistance assessment plan under this paragraph that determined that the tenants of the project generally supported renewal of assistance with tenant-based assistance, but under which assistance for the project was renewed with project-based assistance; and

(ii) each project for which the entity has developed such a plan under which the assistance is renewed using tenant-based assistance.

(3) Eligibility for tenant-based assistance.—Subject to paragraph (4), with respect to any project that is not described in paragraph (1), if a participating administrative entity approves the use of tenant-based

assistance based on a rental assistance assessment plan developed under paragraph (2), tenant-based assistance shall be provided to each assisted family (other than a family already receiving tenant-based assistance) residing in the project at the time the assistance described in section 512(2)(B) terminates.

(4) Rents for families receiving tenant-based assistance.—

(A) In general.—Notwithstanding subsection (c)(1) or (o)(1) of section 8 of the United States Housing Act of 1937, in the case of any family described in paragraph (3) that resides in a project described in section 512(2)(B) in which the reasonable rent (which rent shall include any amount allowed for utilities and shall not exceed comparable market rents for the relevant housing market area) exceeds the fair market rent limitation or the payment standard, as applicable, the amount of assistance for the family shall be determined in accordance with subparagraph (B).

(B) Maximum monthly rent; payment standard.—With respect to the certificate program under section 8(b) of the United States Housing Act of 1937, the maximum monthly rent under the contract (plus any amount allowed for utilities) shall be such reasonable rent for the unit. With respect to the voucher program under section 8(o) of the United States Housing Act of 1937, the payment standard shall be deemed to be such reasonable rent for the unit.

(5) Inapplicability of certain provision.— If a participating administrative entity approves renewal with project-based assistance under this subsection, section 8(d)(2) of the United States Housing Act of 1937 shall not apply.

Sec. 516. <*42 USC 1437f* note> PROHIBITION ON RESTRUCTURING.

(a) Prohibition on Restructuring.—The Secretary may elect not to consider any mortgage restructuring and rental assistance sufficiency plan or request for contract renewal if the Secretary or the participating administrative entity determines that—

(1)(A) the owner or purchaser of the project has engaged in material adverse financial or managerial actions or omissions with regard to such project; or

(B) the owner or purchaser of the project has engaged in material adverse financial or managerial actions or omissions with regard to other projects of such owner or purchaser that are federally assisted or financed with a loan from, or mortgage insured or guaranteed by, an agency of the Federal Government;

(2) material adverse financial or managerial actions or omissions include—

(A) materially violating any Federal, State, or local law or regulation with regard to this project or any other federally assisted project, after receipt of notice and an opportunity to cure;

(B) materially breaching a contract for assistance under section 8 of the United States Housing Act of 1937, after receipt of notice and an opportunity to cure;

(C) materially violating any applicable regulatory or other agreement with the Secretary or a participating administrative entity, after receipt of notice and an opportunity to cure;

(D) repeatedly and materially violating any Federal, State, or local law or regulation with regard to the project or any other federally assisted project;

(E) repeatedly and materially breaching a contract for assistance under section 8 of the United States Housing Act of 1937;

(F) repeatedly and materially violating any applicable regulatory or other agreement with the Secretary or a participating administrative entity;

(G) repeatedly failing to make mortgage payments at times when project income was sufficient to maintain and operate the property;

(H) materially failing to maintain the property according to housing quality standards after receipt of notice and a reasonable opportunity to cure; or

(I) committing any actions or omissions that would warrant suspension or debarment by the Secretary;

(3) the owner or purchaser of the property materially failed to follow the procedures and requirements of this subtitle, after receipt of notice and an opportunity to cure; or

(4) the poor condition of the project cannot be remedied in a cost effective manner, as determined by the participating administrative entity.The term "owner" as used in this subsection, in addition to it having the same meaning as in section 8(f) of the United States Housing Act of 1937, also means an affiliate of the owner. The term "purchaser" as used in this subsection means any private person or entity, including a cooperative, an agency of the Federal Government, or a public housing agency, that, upon purchase of the project, would have the legal right to lease or sublease dwelling units in the project, and also means an affiliate of the purchaser. The terms "affiliate of the owner" and "affiliate of the purchaser" means any person or entity (including, but not limited to, a general partner or managing member, or an officer of either) that controls an owner or purchaser, is controlled by an owner or purchaser, or is under common control with the owner or purchaser. The term "control" means the direct or indirect power (under contract, equity ownership, the right to vote or determine a vote, or otherwise) to direct the financial, legal, beneficial or other interests of the owner or purchaser.

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(b) Opportunity To Dispute Findings.—

(1) In general.— During the 30-day period beginning on the date on which the owner or purchaser of an eligible multifamily housing project receives notice of a rejection under subsection (a) or of a mortgage restructuring and rental assistance sufficiency plan under section 514, the Secretary or participating administrative entity shall provide that owner or purchaser with an opportunity to dispute the basis for the rejection and an opportunity to cure.

(2) Affirmation, modification, or reversal.—

(A) In general.—After providing an opportunity to dispute under paragraph (1), the Secretary or the participating administrative entity may affirm, modify, or reverse any rejection under subsection (a) or rejection of a mortgage restructuring and rental assistance sufficiency plan under section 514.

(B) Reasons for decision.—The Secretary or the participating administrative entity, as applicable, shall identify the reasons for any final decision under this paragraph.

(C) Review process.—The Secretary shall establish an administrative review process to appeal any final decision under this paragraph.

(c) Final Determination.—Any final determination under this section shall not be subject to judicial review.

(d) Displaced Tenants.—Subject to the availability of amounts provided in advance in appropriations Acts, for any low-income tenant that is residing in a project or receiving assistance under section 8 of the United States Housing Act of 1937 at the time of rejection under this section, that tenant shall be provided with tenant-based assistance and reasonable moving expenses, as determined by the Secretary.

(e) Transfer of Property.—For properties disqualified from the consideration of a mortgage restructuring and rental assistance sufficiency plan under this section in accordance with paragraph (1) or (2) of subsection (a) because of actions by an owner or purchaser, the Secretary shall establish procedures to facilitate the voluntary sale or transfer of a property as part of a mortgage restructuring and rental assistance sufficiency plan, with a preference for tenant organizations and tenant-endorsed community-based nonprofit and public agency purchasers meeting such reasonable qualifications as may be established by the Secretary.

Sec. 517. <*42 USC 1437f* note> RESTRUCTURING TOOLS.

(a) Mortgage Restructuring.—

(1) In this subtitle, an approved mortgage restructuring and rental assistance sufficiency plan shall include restructuring mortgages in accordance with this subsection to provide—

(A) a restructured or new first mortgage that is sustainable at rents at levels that are established in section 514(g); and

(B) a second mortgage that is in an amount equal to no more than the difference between the restructured or new first mortgage and the indebtedness under the existing insured mortgage immediately before it is restructured or refinanced, provided that the amount of the second mortgage shall be in an amount that the Secretary or participating administrative entity determines can reasonably be expected to be repaid.

(2) The second mortgage shall bear interest at a rate not to exceed the applicable Federal rate as defined in section 1274(d) of the Internal Revenue Code of 1986. The term of the second mortgage shall be equal to the term of the restructured or new first mortgage.

(3) Payments on the second mortgage shall be deferred when the first mortgage remains outstanding, except to the extent there is excess project income remaining after payment of all reasonable and necessary operating expenses (including deposits in a reserve for replacement), debt service on the first mortgage, and any other expenditures approved by the Secretary. At least 75 percent of any excess project income shall be applied to payments on the second mortgage, and the Secretary or the participating administrative entity may permit up to 25 percent to be paid to the project owner if the Secretary or participating administrative entity determines that the project owner meets benchmarks for management and housing quality.

(4) The full amount of the second mortgage shall be immediately due and payable if—

(A) the first mortgage is terminated or paid in full, except as otherwise provided by the holder of the second mortgage;

(B) the project is purchased and the second mortgage is assumed by any subsequent purchaser in violation of guidelines established by the Secretary; or

(C) the Secretary provides notice to the project owner that such owner has failed to materially comply with any requirements of this section or the United States Housing Act of 1937 as those requirements apply to the project, with a reasonable opportunity for such owner to cure such failure.

(5) The Secretary may modify the terms or forgive all or part of the second mortgage if the Secretary holds the second mortgage and if the project is acquired by a tenant organization or tenant-endorsed community-based nonprofit or public agency, pursuant to guidelines established by the Secretary.

(b) Restructuring Tools.—In addition to the requirements of subsection (a) and to the extent these actions are consistent with this section and with the control of the Secretary of applicable accounts in the Treasury of the United States, an approved mortgage

restructuring and rental assistance sufficiency plan under this subtitle may include one or more of the following actions:

(1) Full or partial payment of claim.— making a full payment of claim or partial payment of claim under section 541(b) of the National Housing Act, as amended by section 523(b) of this Act. Any payment under this paragraph shall not require the approval of a mortgagee;

(2) Refinancing of debt.— refinancing of all or part of the debt on a project. If the refinancing involves a mortgage that will continue to be insured under the National Housing Act, the refinancing shall be documented through amendment of the existing insurance contract and not through a new insurance contract;

(3) Mortgage insurance.— providing FHA multifamily mortgage insurance, reinsurance or other credit enhancement alternatives, including multifamily risk-sharing mortgage programs, as provided under section 542 of the Housing and Community Development Act of 1992. Any limitations on the number of units available for mortgage insurance under section 542 shall not apply to eligible multifamily housing projects. Any credit subsidy costs of providing mortgage insurance shall be paid from the Liquidating Accounts of the General Insurance Fund or the Special Risk Insurance Fund and shall not be subject to any limitation on appropriations;

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(4) Credit enhancement.— providing any additional State or local mortgage credit enhancements and risk-sharing arrangements that may be established with State or local housing finance agencies, the Federal Housing Finance Board, the Federal National Mortgage Association, and the Federal Home Loan Mortgage Corporation, to a modified or refinanced first mortgage;

(5) Compensation of third parties.— consistent with the portfolio restructuring agreement, entering into agreements, incurring costs, or making payments, including incentive agreements designed to reward superior performance in meeting the purposes of this Act, as may be reasonably necessary, to compensate the participation of participating administrative entities and other parties in undertaking actions authorized by this subtitle. Upon request to the Secretary, participating administrative entities that are qualified under the United States Housing Act of 1937 to serve as contract administrators shall be the contract administrators under section 8 of the United States Housing Act of 1937 for purposes of any contracts entered into as part of an approved mortgage restructuring and rental assistance sufficiency plan. Subject to the availability of amounts provided in advance in appropriations Acts for administrative fees under section 8 of the United States Housing Act of 1937, such amounts may be used to compensate participating administrative entities for compliance monitoring costs incurred under section 519;

(6) Use of project accounts.— applying any residual receipts, replacement reserves, and any other project

accounts not required for project operations, to maintain the long-term affordability and physical condition of the property or of other eligible multifamily housing projects. The participating administrative entity may expedite the acquisition of residual receipts, replacement reserves, or other such accounts, by entering into agreements with owners of housing covered by an expiring contract to provide an owner with a share of the receipts, not to exceed 10 percent, in accordance with guidelines established by the Secretary; and

(7) Rehabilitation needs.—

(A) In general.—Rehabilitation may be paid from the residual receipts, replacement reserves, or any other project accounts not required for project operations, or, as provided in appropriations Acts and subject to the control of the Secretary of applicable accounts in the Treasury of the United States, from budget authority provided for increases in the budget authority for assistance contracts under section 8 of the United States Housing Act of 1937, the rehabilitation grant program established under section 236 of the National Housing Act, as amended by section 531 of subtitle B of this Act, or through the debt restructuring transaction. Rehabilitation under this paragraph shall only be for the purpose of restoring the project to a non-luxury standard adequate for the rental market intended at the original approval of the project-based assistance.

(B) Contribution.—Each owner or purchaser of a project to be rehabilitated under an approved mortgage restructuring and rental assistance sufficiency plan shall contribute, from non-project resources, not less than 25 percent of the amount of rehabilitation assistance received, except that the participating administrative entity may provide an exception from the requirement of this subparagraph for housing cooperatives.

(c) Role of FNMA and FHLMC.—Section 1335 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 *(12 U.S.C. 4565)* is amended—

(1) in paragraph (3), by striking "and" at the end;

(2) paragraph (4), by striking the period at the end and inserting "; and";

(3) by striking "To meet" and inserting the following:

"(a) In General.—To meet"; and

(4) by adding at the end the following:

"(5) assist in maintaining the affordability of assisted units in eligible multifamily housing projects with expiring contracts, as defined under the Multifamily Assisted Housing Reform and Affordability Act of 1997.

"(b) Affordable Housing Goals.—Actions taken under subsection (a)(5) shall constitute part of the contribution of each entity in meeting its affordable housing goals under sections 1332, 1333, and 1334 for any fiscal year, as determined by the Secretary.".

(d) Prohibition on Equity Sharing by the Secretary.—The Secretary is prohibited from participating in any equity agreement or profit-sharing agreement in conjunction with any eligible multifamily housing project.

(e) Conflict of Interest Guidelines.—The Secretary may establish guidelines to prevent conflicts of interest by a participating administrative entity that provides, directly or through risk-sharing arrangements, any form of credit enhancement or financing pursuant to subsections (b)(3) or (b)(4) or to prevent conflicts of interest by any other person or entity under this subtitle.

Sec. 518. <*42 USC 1437f* note> MANAGEMENT STANDARDS.

Each participating administrative entity shall establish management standards, including requirements governing conflicts of interest between owners, managers, contractors with an identity of interest, pursuant to guidelines established by the Secretary and consistent with industry standards.

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Sec. 519. <*42 USC 1437f* note> MONITORING OF COMPLIANCE.

(a) Compliance Agreements.—(1) Pursuant to regulations issued by the Secretary under section 522(a), each participating administrative entity, through binding contractual agreements with owners and otherwise, shall ensure long-term compliance with the provisions of this subtitle. Each agreement shall, at a minimum, provide for—

(A) enforcement of the provisions of this subtitle; and

(B) remedies for the breach of those provisions.

(2) If the participating administrative entity is not qualified under the United States Housing Act of 1937 to be a section 8 contract administrator or fails to perform its duties under the portfolio restructuring agreement, the Secretary shall have the right to enforce the agreement.

(b) Periodic Monitoring.—

(1) In general.— Not less than annually, each participating administrative entity that is qualified to be the section 8 contract administrator shall review the status of all multifamily housing projects for which a mortgage restructuring and rental assistance sufficiency plan has been implemented.

(2) Inspections.— Each review under this subsection shall include onsite inspection to determine compliance with housing codes and other requirements as provided in this subtitle and the portfolio restructuring agreements.

(3) Administration.— If the participating administrative entity is not qualified under the United States Housing Act of 1937 to be a section 8 contract administrator, either the Secretary or a qualified State or local housing agency shall be responsible for the review required by this subsection.

(c) Audit by the Secretary.—The Comptroller General of the United States, the Secretary, and the Inspector General of the Department of Housing and Urban Development may conduct an audit at any time of any multifamily housing project for which a mortgage restructuring and rental assistance sufficiency plan has been implemented.

Sec. 520. <*42 USC 1437f* note> REPORTS TO CONGRESS.

(a) Annual Review.—In order to ensure compliance with this subtitle, the Secretary shall conduct an annual review and report to the Congress on actions taken under this subtitle and the status of eligible multifamily housing projects.

(b) Semiannual Review.—Not less than semiannually during the 2-year period beginning on the date of the

enactment of this Act and not less than annually thereafter, the Secretary shall submit reports to the Committee on Banking and Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate stating, for such periods, the total number of projects identified by participating administrative entities under each of clauses (i) and (ii) of section 515(c)(2)(C).

Sec. 521. <*42 USC 1437f* note> GAO AUDIT AND REVIEW.

(a) Initial Audit.—Not later than 18 months after the effective date of final regulations promulgated under this subtitle, the Comptroller General of the United States shall conduct an audit to evaluate eligible multifamily housing projects and the implementation of mortgage restructuring and rental assistance sufficiency plans.

(b) Report.—

(1) In general.— Not later than 18 months after the audit conducted under subsection (a), the Comptroller General of the United States shall submit to Congress a report on the status of eligible multifamily housing projects and the implementation of mortgage restructuring and rental assistance sufficiency plans.

(2) Contents.— The report submitted under paragraph (1) shall include—

(A) a description of the initial audit conducted under subsection (a); and

(B) recommendations for any legislative action to increase the financial savings to the Federal Government of the restructuring of eligible multifamily housing projects balanced with the continued availability of the maximum number of affordable low-income housing units.

Sec. 522. <*42 USC 1437f* note> REGULATIONS.

(a) Rulemaking and Implementation.—

(1) Interim regulations.— The Director shall issue such interim regulations as may be necessary to implement this subtitle and the amendments made by this subtitle with respect to eligible multifamily housing projects covered by contracts described in section 512(2)(B) that expire in fiscal year 1999 or thereafter. If, before the expiration of such period, the Director has not been appointed, the Secretary shall issue such interim regulations.

(2) Final regulations.— The Director shall issue final regulations necessary to implement this subtitle and the amendments made by this subtitle with respect to eligible multifamily housing projects covered by contracts described in section 512(2)(B) that expire in fiscal year 1999 or thereafter before the later of: (A) the expiration of the 12-month period beginning upon the date of the enactment of this Act; and (B) the 3-month

period beginning upon the appointment of the Director under subtitle D.

(3) Factors for consideration.— Before the publication of the final regulations under paragraph (2), in addition to public comments invited in connection with publication of the interim rule, the Secretary shall—

(A) seek recommendations on the implementation of sections 513(b) and 515(c)(1) from organizations representing—

(i) State housing finance agencies and local housing agencies;

(ii) other potential participating administering entities;

(iii) tenants;

(iv) owners and managers of eligible multifamily housing projects;

(v) States and units of general local government; and

(vi) qualified mortgagees; and

(B) convene not less than 3 public forums at which the organizations making recommendations under subparagraph (A) may express views concerning the proposed disposition of the recommendations.

(b) Transition Provision for Contracts Expiring in Fiscal Year 1998.—Notwithstanding any other provision of law, the Secretary shall apply all the terms of section 211 and section 212 of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997 (except for section 212(h)(1)(G) and the limitation in section 212(k)) contracts for project-based assistance that expire during fiscal year 1998 (in the same manner that such provisions apply to expiring contracts defined in section 212(a)(3) of such Act), except that section 517(a) of the Act shall apply to mortgages on projects subject to such contracts.

Sec. 523. <*42 USC 1437f* note> TECHNICAL AND CONFORMING AMENDMENTS.

(a) Calculation of Limit on Project-Based Assistance.—Section 8(d) of the United States Housing Act of 1937 (*42 U.S.C. 1437f*(d)) is amended by adding at the end the following:

"(5) Calculation of limit.— Any contract entered into under section 514 of the Multifamily Assisted Housing Reform and Affordability Act of 1997 shall be excluded in computing the limit on project-based assistance under this subsection.".

(b) Partial Payment of Claims on Multifamily Housing Projects.—Section 541 of the National Housing Act *(12 U.S.C. 1735f-19)* is amended—

(1) in subsection (a), in the subsection heading, by striking "Authority" and inserting "Defaulted Mortgages";

(2) by redesignating subsection (b) as subsection (c); and

(3) by inserting after subsection (a) the following:

"(b) Existing Mortgages.—Notwithstanding any other provision of law, the Secretary, in connection with a mortgage restructuring under section 514 of the Multifamily Assisted Housing Reform and Affordability Act of 1997, may make a one time, nondefault partial payment of the claim under the mortgage insurance contract, which shall include a determination by the Secretary or the participating administrative entity, in accordance with the Multifamily Assisted Housing Reform and Affordability Act of 1997, of the market value of the project and a restructuring of the mortgage, under such terms and conditions as are permitted by section 517(a) of such Act.".

(c) Reuse and Rescission of Certain Recaptured Budget Authority.—Section 8(bb) of the United States Housing Act of 1937 *(42 U.S.C. 1437f*(bb)) is amended—

(1) by inserting after "(bb)" the following:

"Transfer, Reuse, and Rescission of Budget Authority.—

"(1)"; and

(2) by inserting the following new paragraph at the end:

"(2) Reuse and rescission of certain recaptured budget authority.— Notwithstanding paragraph (1), if a project-based assistance contract for an eligible multifamily housing project subject to actions authorized under title I is terminated or amended as part of restructuring under section 517 of the Multifamily Assisted Housing Reform and Affordability Act of 1997, the Secretary shall recapture the budget authority not required for the terminated or amended contract and use such amounts as are necessary to provide housing assistance for the same number of families covered by such contract for the remaining term of such contract, under a contract providing for project-based or tenant-based assistance. The amount of budget authority saved as a result of the shift to project-based or tenant-based assistance shall be rescinded.".

(d) Section 8 Contract Renewals.—Section 405(a) of the Balanced Budget Downpayment Act, I *(42 U.S.C. 1437f* note) is amended by striking "For" and inserting "Notwithstanding part 24 of title 24 of the Code of Federal Regulations, for".

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(e) Renewal Upon Request of Owner.—Section 211(b)(3) of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997 (Public Law 104-204; *110 Stat. 2896*) <*42 USC 1437f* note> is amended—

(1) by striking the paragraph heading and inserting the following:

"(3) Exemption of certain other projects.—"; and

(2) by striking "section 202 projects, section 811 projects and section 515 projects" and inserting "section 202 projects, section 515 projects, projects with contracts entered into pursuant to section 441 of the Stewart B. McKinney Homeless Assistance Act, and projects with rents that exceed 100 percent of fair market rent for the market area, but that are less than rents for comparable projects".

(f) Extension of Demonstration Contract Period.—Section 212(g) of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997 (Public Law 104-204) <*42 USC 1437f* note> is amended—

(1) by inserting "(1)" after "(g)";

(2) by inserting before the period at the end the following: "or in paragraph (2)"; and

(3) by adding at the end the following:

"(2) The Secretary may renew a demonstration contract for an additional period of not to exceed 120 days, if—

"(A) the contract was originally executed before February 1, 1997, and the Secretary determines, in the sole discretion of the Secretary, that the renewal period for the contract needs to exceed 1 year, due to delay of publication of the Secretary's demonstration program guidelines until January 23, 1997 (not to exceed 21 projects); or

"(B) the contract was originally executed before October 1, 1997, in connection with a project that has been identified for restructuring under the joint venture approach described in section VII.B.2. of the Secretary's demonstration program guidelines, and the Secretary determines, in the sole discretion of the Secretary, that the renewal period for the contract needs to exceed 1 year, due to delay in implementation of the joint venture agreement required by the guidelines (not to exceed 25 projects).".

Sec. 524. <*42 USC 1437f* note> SECTION 8 CONTRACT RENEWALS.

(a) Section 8 Contract Renewal Authority.—

(1) In general.— Notwithstanding part 24 of title 24 of the Code of Federal Regulations and subject to

section 516 of this subtitle, for fiscal year 1999 and henceforth, the Secretary may use amounts available for the renewal of assistance under section 8 of the United States Housing Act of 1937, upon termination or expiration of a contract for assistance under section 8 (other than a contract for tenant-based assistance and notwithstanding section 8(v) of such Act for loan management assistance), to provide assistance under section 8 of such Act at rent levels that do not exceed comparable market rents for the market area. The assistance shall be provided in accordance with terms and conditions prescribed by the Secretary.

(2) Exception projects.— Notwithstanding paragraph (1), upon the request of the owner, the Secretary shall renew an expiring contract in accordance with terms and conditions prescribed by the Secretary at the lesser of: (i) existing rents, adjusted by an operating cost adjustment factor established by the Secretary; (ii) a level that provides income sufficient to support a budget-based rent (including a budget-based rent adjustment if justified by reasonable and expected operating expenses); or (iii) in the case of a contract under the moderate rehabilitation program, other than a moderate rehabilitation contract under section 441 of the Stewart B. McKinney Homeless Assistance Act, the base rent adjusted by an operating cost adjustment factor established by the Secretary, for the following categories of multifamily housing projects—

(A) projects for which the primary financing or mortgage insurance was provided by a unit of State

government or a unit of general local government (or an agency or instrumentality of either) and is not insured under the National Housing Act;

(B) projects for which the primary financing was provided by a unit of State government or a unit or general local government (or an agency or instrumentality of either) and the financing involves mortgage insurance under the National Housing Act, such that the implementation of a mortgage restructuring and rental assistance sufficiency plan under this Act is in conflict with applicable law or agreements governing such financing;

(C) projects financed under section 202 of the Housing Act of 1959 or section 515 of the Housing Act of 1949;

(D) projects that have an expiring contract under section 8 of the United States Housing Act of 1937 pursuant to section 441 of the Stewart B. McKinney Homeless Assistance Act; and

(E) projects that do not qualify as eligible multifamily housing projects pursuant to section 512(2) of this subtitle.

Nos. 09-435 and 09-445

In the Supreme Court of the United States

NEW WEST, L.P., ET AL., PETITIONERS

v.

CITY OF JOLIET, ILLINOIS, ET AL.

TERESA DAVIS, ET AL., PETITIONERS

v.

CITY OF JOLIET, ILLINOIS

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a city ordinance condemning a privately owned, federally subsidized, low-income housing project is impliedly preempted by federal law that requires the property to be maintained as low-income housing for 30 years.

2. Whether the Property Clause of the Constitution bars a city's exercise of its eminent domain power against property on which the United States holds a mortgage.

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In the Supreme Court of the United States

No. 09-435

NEW WEST, L.P., ET AL., PETITIONERS

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v.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 562 F.3d 830.[1] The opinions of the district court (Pet. App. 19a-29a, 30a-42a) are unreported.

[1] All references to "Pet. App." are to the appendix in No. 09-435.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2009. Petitions for rehearing were denied on July 14, 2009 (Pet. App. 43a-44a). The petitions for a writ of certiorari were filed on October 13, 2009 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1997, Congress enacted the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA or Act), Pub. L. No. 105-65, Tit. V, 111 Stat. 1384. The Act's stated purposes are, *inter alia*, "to preserve low-income rental housing affordability and availability while reducing the long-term costs of project-based [federal] assistance"; "to resolve the problems affecting financially and physically troubled federally insured and assisted multifamily housing projects through cooperation with residents, owners, State and local governments, and other interested entities"; and "to protect the interest of project owners and managers, because they are partners of the Federal Government in meeting the affordable housing needs of the Nation." MAHRA § 511(b)(1), (6) and (7), 111 Stat. 1387. To accomplish those purposes, Congress directed the Department of Housing and Urban Development (HUD) to administer a detailed process through which owners of eligible, federally subsidized, low-income housing are entitled to restructure the financing of their properties. In return, MAHRA requires owners to make needed repairs and to agree to maintain the properties as low-income housing for at least 30 years. MAHRA § 514(e), 111 Stat. 1393. HUD has promulgated exten-

sive regulations governing that process. See 24 C.F.R. Pt. 401, 402.

When the owner of eligible low-income housing seeks to refinance its debt, MAHRA requires HUD to develop a Restructuring Plan. MAHRA § 514(a)(1), 111 Stat. 1392; see 24 C.F.R. 401.100, 401.101 (eligibility criteria). HUD hires a Participating Administrative Entity (PAE) to undertake that project. MAHRA § 512(10) and 513, 111 Stat. 1389. Among other things, the PAE assesses whether there is "adequate[,] available and affordable" alternative housing in the particular market, MAHRA § 515(c)(1)(A), 111 Stat. 1397, and analyzes the property's rent level, debt and expenses, as well as its repair and reserve needs. 24 C.F.R. 401.410-411, 401.451-453. Congress created a specific role for local governments and other interested parties in the lengthy restructuring process, mandating notice and an opportunity to participate. MAHRA § 514(f), 111 Stat. 1394; see also 24 C.F.R. 401.500(a), 401.501(b)(1).

The final Restructuring Plan must "require" the owner to rehabilitate the property as necessary and to provide adequate reserves to maintain it in decent and safe condition pursuant to established standards. MAHRA § 514(e)(5), 111 Stat. 1393. The keystone of MAHRA, however, is Section 514(e)(6), which mandates significant use restrictions on the property. That provision specifies that the Restructuring Plan "shall * * * require the owner or purchaser of the project to maintain affordability and use restrictions in accordance with regulations promulgated by [HUD], for a term of not less than 30 years." MAHRA § 514(e)(6), 111 Stat. 1393. In addition, those use restrictions "shall be * * * contained in a legally enforceable document recorded in the appropriate records" and "shall be * * * consistent

with the long-term physical and financial viability and character of the project as affordable housing." MAHRA § 514(e)(6)(A) and (B), 111 Stat. 1393; see 24 C.F.R. 401.408(a). Thus, the statutorily required use restrictions are a form of covenant that runs with the land. Congress has accordingly directed HUD or the PAE to "ensure long-term compliance" with MAHRA and the "binding contractual agreements with owners" executed thereunder. MAHRA § 519(a), 111 Stat. 1404; see 24 C.F.R. 401.550.

2. a. Evergreen Terrace I and II are multifamily properties that have long provided housing to low-income residents of the respondent City of Joliet, Illinois (the City). HUD acquired both properties through foreclosure and sold each to their current owners, petitioners New West, L.P., and New Bluff, L.P. (collectively, New West), for $1 in the early 1980s. HUD insured New West's 40-year mortgages on Evergreen Terrace under Section 221 of the National Housing Act (NHA), 12 U.S.C. 1715*l*. In return, New West became subject to Regulatory Agreements explicitly incorporated into the mortgages, as authorized by the NHA, 12 U.S.C. 1715*l*(d)(4). Those agreements required New West to maintain Evergreen Terrace's 356 units as low-income housing for families eligible for housing assistance under Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f.

b. In November 2001, New West informed HUD of its desire to restructure its Evergreen Terrace debt under MAHRA, thereby triggering the statute's mandatory process. See Pet. App. 6a. HUD selected the Illinois Housing Development Authority (IHDA) to serve as the PAE. IHDA found "a critical need" to preserve Evergreen Terrace. C.A. App. 100. When the City,

which participated in the restructuring process, challenged IHDA's findings, HUD hired another PAE, Heskin Signet Partners, to perform a second analysis. Heskin Signet confirmed IHDA's findings: there is "a compelling need to preserve the housing stock represented by Evergreen Terrace I and II due to the absolute lack of alternative housing for the approximately 600 current residents." *Id.* at 101. Heskin Signet then developed a plan for the cost-effective rehabilitation and ongoing maintenance of the property.

On the basis of the two independent PAE analyses and after meetings with the City, New West, and tenants, HUD approved a final Restructuring Plan for Evergreen Terrace in September 2006. Two months later, New West obtained a mortgage from HUD to replace its prior HUD-insured mortgage, and it executed and recorded the 30-year Use Agreements required by MAHRA Section 514(e)(6). New Regulatory Agreements and contracts for Section 8 housing assistance for the tenants were also executed. C.A. App. 102.

3. In 2005, after the issuance of both PAE reports and as the restructuring process was nearing completion, the City declared Evergreen Terrace to be a "public nuisance," and it enacted an ordinance condemning the property. C.A. App. 312-313, 315-318. Through its exercise of eminent domain, the City proposes to tear down Evergreen Terrace and to redevelop the property for uses other than low-income housing. *Id.* at 316. Soon after passing the ordinance, the City filed this condemnation action in state court, and the case was removed to federal district court. See Pet. App. 4a.

HUD and New West raised preemption and other defenses to the City's action. As HUD explained, Congress created the MAHRA restructured financing pro-

cess in order to preserve the nation's stock of low-income housing in partnership with the private sector. HUD argued that the City's proposed condemnation of Evergreen Terrace and diversion of the property to uses other than low-income housing—without HUD's consent—would pose "an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" in MAHRA. *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1201 (2009) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). HUD therefore contended that, under the Supremacy Clause of the Constitution (Art. VI, Cl. 2) and implied conflict preemption, the City's proposed taking of Evergreen Terrace must yield to the agency's determination in the MAHRA restructuring process that the property can and must be preserved in order to meet the "compelling need" for such housing in the community. C.A. App. 101.

The City moved for judgment on the pleadings with respect to the parties' preemption defense, and the district court granted its motion. Pet. App. 30a-42a. Relying on a discussion of different statutes in a related case in which HUD was not a party, see *New West, L.P.* v. *City of Joliet*, 491 F.3d 717, 721 (7th Cir. 2007), the district court held that MAHRA does not preempt the City's proposed exercise of its eminent domain power. Pet. App. 40a-41a. In a later order, the district court denied motions for summary judgment filed by HUD and New West, which argued, among other things, that the City's action was barred by the Property Clause of the Constitution (Art. IV, § 3, Cl. 2). Pet. App. 19a-29a.[2]

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[2] Several Evergreen Terrace tenants—petitioners in No. 09-445—intervened as defendants in the City's action in January 2008. Pet. App. 28a-29a.

HUD and New West petitioned the district court to certify for interlocutory review pursuant to 28 U.S.C. 1292(b) its order rejecting their implied preemption defense. New West also asked the district court to certify its order rejecting certain other defenses that it had raised in its summary judgment motion. The court granted HUD's and New West's requests, and the court of appeals accepted review.

4. The court of appeals affirmed. It found no "clear statement" or "federal command" in the housing laws at issue that preempted the City's ordinance authorizing the condemnation of Evergreen Terrace, explaining that the "findings" and "purposes" provisions of those statutes were insufficient to establish Congress's intent to preempt. Pet. App. 12a-14a. Relying on *Wyeth*, 129 S. Ct. at 1199-1204, the court of appeals further found it significant that there was no "preemptive regulation with the force of law." Pet. App. 8a; see also *id.* at 11a, 12a. The court concluded that there was no clash of goals and objectives because several HUD regulations demonstrated the agency's intent not to preempt the condemnation of federally subsidized housing for low-income families. *Id.* at 8a-10a. The court also found it "hard to see any conflict between federal and state goals" because participation in the involved low-income housing program is not "compulsory," and "it is not a violation of federal law for a given owner to remain outside the program." *Id.* at 9a.

Thus, according to the court of appeals, "there is no *affirmative* declaration of preemption in any statute or rule, no concrete conflict between condemnation and any part of [MAHRA], and no good reason to think that [MAHRA] contravenes HUD's own regulations under § 8 and [NHA] § 221." Pet. App. 11a. The court added:

> It might be sensible to enact a system under which HUD could certify a lack of affordable housing in a given locale and thus block any steps to diminish the existing stock. But no federal statute gives HUD this authority, let alone one that can be exercised without notice to the cities whose powers will be diminished.

Id. at 15a.

The court of appeals also rejected several additional arguments advanced by New West and the tenants based on the Contract and Property Clauses of the Constitution (Art. I, § 10, Cl. 1; Art. IV. § 3, Cl. 2) and the principle of intergovernmental immunity. Pet. App. 17a-18a. The court found no authority holding that "the Property Clause (or any other part of the Constitution) treats a federal loan as immunizing the borrower from state regulation (including eminent domain) on the theory that the state is 'really' regulating the federal interest as a lender." *Id.* at 18a. HUD, New West, and the tenants sought rehearing en banc, and the court denied the petitions. *Id.* at 43a-44a.

ARGUMENT

The court of appeals erred in ruling that MAHRA does not preempt the City's condemnation of Evergreen Terrace. HUD determined, in the extensive MAHRA process in which the City participated, that Evergreen Terrace could be rehabilitated and must be preserved in order to meet the "compelling need" for low-income housing in the Joliet community. C.A. App. 101. HUD accordingly provided New West with restructured financing for the property, and, in return, New West agreed in a recorded, "legally enforceable" document—as MAHRA Section 514(e)(6) explicitly requires—to

maintain the property as low-income housing for at least 30 years. The City now seeks to override that process and to veto HUD's determination by condemning Evergreen Terrace and diverting the property to other uses. That effort is contrary to the cooperative, participatory role that Congress prescribed for local governments in the MAHRA restructuring process and presents "an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" in MAHRA. *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1201 (2009) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). The City's condemnation ordinance and action are therefore preempted.

Nonetheless, review by this Court is not warranted at the present time. This case is the first in which a State or local government has sought to condemn, without HUD's consent, a property that has undergone MAHRA restructuring. The Court's ultimate resolution of the preemption question presented by both petitions would benefit from further consideration in the lower courts. Similarly, the Property Clause question presented by New West's petition for a writ of certiorari has not previously been addressed by any other court of appeals. Further review therefore is not warranted.

A. 1. a. The court of appeals erred in relying on the absence of "a preemptive regulation with the force of law" in concluding that preemption could not be "inferred from a clash of goals and objectives" in the context of this case. Pet. App. 8a.; see *id.* at 11a, 12a. The court based that conclusion on this Court's recent decision in *Wyeth*, 129 S. Ct. at 1199-1204. But neither *Wyeth* nor any other decision of this Court holds that a preemptive regulation is necessary in order to find "frustration of purpose" preemption. In fact, this Court

rejected that argument in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000):

> To insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended. The dissent * * * apparently welcomes that result, at least where "frustration-of-purpos[e]" pre-emption by agency regulation is at issue. * * * We do not.

Id. at 885.

Wyeth is not to the contrary. There, the Court found no preemption because, it concluded, state failure-to-warn claims did not present an obstacle to the accomplishment of the purposes of federal drug labeling requirements. 129 S. Ct. at 1204. The Court declined to give deference to the position of the Food and Drug Administration (FDA) that there was preemption, because that position was expressed only in a preamble to a rule, was contrary to "Congress' purposes" in the federal drug laws, and was a reversal of FDA's "own longstanding position without * * * a reasoned explanation" or "any discussion of how state law has interfered" with federal regulation. *Id.* at 1201. Citing *Geier*, *supra*, the Court explained that "an agency regulation with the force of law can pre-empt conflicting state requirements." *Wyeth*, 129 S. Ct. at 1200. But the Court noted that, even when such a regulation exists, the Court has "performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption." *Id.* at 1200-1201.

Thus, while *Wyeth* reaffirmed that a properly promulgated agency regulation can preempt state law, 129

S. Ct. at 1200, *Wyeth* does not support the weight the court of appeals attached to the absence of such a regulation here.

b. The court of appeals also misunderstood the nature of the lengthy MAHRA restructuring process prescribed by Congress. The court acknowledged that "[i]t might be sensible to enact a system under which HUD could certify a lack of affordable housing in a given locale and thus block any steps to diminish the existing stock." Pet. App. 15a. The court mistakenly concluded, however, that "no federal statute gives HUD this authority, let alone one that can be exercised without notice to the cities whose powers will be diminished." *Ibid.* In fact, the "sensible" process the court of appeals posited is precisely what the MAHRA entails and what occurred in this case.[3]

As explained above, before HUD can approve a Restructuring Plan, MAHRA requires an assessment of the "adequate[,] available and affordable housing" in the particular market. MAHRA § 515(c)(1)(A), 111 Stat 1397. In addition, the owner and PAE must evaluate the project's "rehabilitation needs," and the owner is "require[d] * * * to take such actions as may be necessary to rehabilitate [the property], [to] maintain adequate reserves, and to maintain the project in decent and safe condition." MAHRA § 514(e)(3) and (5), 111 Stat. 1393. Local governments are given notice and the opportunity to participate in the restructuring process. MAHRA § 514(f)(1) and (2), 111 Stat. 1394.

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[3] The court of appeals mistakenly believed that HUD's preemption argument rested solely on the NHA and MAHRA "findings" and "purposes" clauses, overlooking, in particular, the operative provisions of MAHRA cited and discussed by HUD. See Pet. App. 8a, 12a-14a.

Pursuant to those statutory requirements, HUD obtained two independent evaluations of the need for Evergreen Terrace, as well as the feasibility and cost of rehabilitating the property. Both reports concluded that there was a "compelling need" to preserve Evergreen Terrace because of "the absolute lack of alternative housing" in the Joliet area for Evergreen Terraces's 600 low-income residents. C.A. App. 101. The reports also concluded that Evergreen Terrace could be "repaired in a cost-effective manner." *Ibid.* Based on those analyses and other information obtained during the restructuring process, HUD approved the Restructuring Plan and provided new mortgages to New West, and New West executed the 30-year Use Agreements mandated by MAHRA Section 514(e)(6). And contrary to the court of appeals' suggestion that the MAHRA process is conducted "without notice to the cities whose powers will be diminished," Pet. App. 15a, the City not only received the notice required by MAHRA Section 514(f) but also participated actively in the restructuring process. See *New West, L.P.* v. *City of Joliet*, No. 05-C-1743, 2006 WL 2632752, at *1-*2 (N.D. Ill. Sept. 8, 2006), rev'd, 491 F.3d 717 (7th Cir. 2007).

Thus, MAHRA prescribes an administrative process that essentially constitutes the "sensible" system the court of appeals acknowledged would preempt the City's condemnation action. Pet. App. 15a. That process, which is established by the statute itself, makes unnecessary a HUD regulation specifically stating MAHRA's preemptive effect.[4]

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[4] The decision below also appeared to rest on two incorrect factual assumptions. First, the court cited various HUD regulations that refer to the condemnation of low-income housing properties, see Pet. App. 10a (citing 24 C.F.R. 245.405, 248.101 and 970.3), and questioned "the

c. The court of appeals erred in reasoning that MAHRA lacks preemptive effect because it permits, but does not mandate, property owners to restructure their financing under its terms. See Pet. App. 9a. That proposition is inconsistent with *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982), which held that a Federal Home Loan Bank Board (the Board) regulation that permitted, but did not require, federal savings and loan associations to include "due-on-sale" clauses in their mortgage contracts preempted state law that restricted the use of such clauses. This Court reasoned that such state law posed an obstacle to an objective that the Board considered essential and, in addressing an argument similar to the view of the court of appeals, stated that "[t]he conflict [between federal and state law] does not evaporate because the Board's regulation simply permits, but does not compel, federal sav-

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point of a special rule for applying the proceeds of condemnation if, as HUD argues, condemnation is always preempted." *Ibid.* But apart from the fact that the cited regulations implement different housing programs not at issue here, HUD has never contended that a city's condemnation of any federally subsidized low-income housing project is always preempted by federal law. The key factor is HUD's determination of the viability of and need for the project in accordance with statutory mandates for the particular federal housing program involved.

Second, the court stated that "[p]rivate owners are entitled to withdraw their properties from the program at any time despite their 20-year and 30-year promises" by paying off their federally insured loans. Pet. App. 9a (citing 24 C.F.R. Pt. 248). That is incorrect. The regulatory provisions the court cited as support for that assertion were promulgated under a different statute. See Emergency Low Income Housing Preservation Act of 1987, 12 U.S.C. 1715*l* note; Low-Income Housing Preservation and Resident Homeownership Act of 1990, 12 U.S.C. 4101 *et seq.* Prepayment of a loan on a property that has undergone MAHRA restructuring does not extinguish the statutorily mandated and recorded 30-year use restriction.

ings and loans to include due-on-sale clauses in their contracts." *Id.* at 155-156.

While the decision to participate in a federally subsidized low-income housing program is voluntary, once a private owner decides to participate, federal law imposes requirements on that owner and regulates its participation in the program. Thus, the focus must be on what Congress intended when it created the program and imposed those requirements, not on whether participation in the program is voluntary or mandatory. See *Wyeth*, 129 S. Ct. at 1194 ("the purpose of Congress is the ultimate touchstone in every pre-emption case") (citation omitted).

2. Despite the errors in the decision below, this Court's review is not warranted. This is the first case in which a state or local government has sought to condemn and divert to a different use a federally subsidized housing property that has undergone restructuring under MAHRA and that is therefore subject to the statute's 30-year use restriction.

a. In their petition for a writ of certiorari, the Evergreen Terrace tenants contend that the circuits are divided on whether a federal preemptive regulation with the force of law is necessary to a finding of implied preemption. 09-445 Pet. 17-24. The court of appeals in this case does not appear to have held that such a regulation is always necessary. See Pet. App. 9a, 10a-11a. By the same token, that issue was not squarely presented in the courts of appeals cases upon which the tenants rely. In *City of Morgan City* v. *South Louisiana Electric Cooperative Ass'n*, 31 F.3d 319, 324 (5th Cir. 1994), cert. denied, 516 U.S. 908 (1995) (*Morgan City*), and *Public Utility District No. 1 of Pend Oreille County* v. *United States*, 417 F.2d 200, 201 (9th Cir. 1969) (*Pend Oreille*),

the courts of appeals held that a local jurisdiction's attempt to condemn certain property of a utility financed by the federal government under the Rural Electrification Act of 1936 (REAct), 7 U.S.C. 901 *et seq.*, was preempted because it would frustrate the accomplishment of Congress's goals and objectives under that act.[5]

As in this case, the federal government's preemption argument in *Morgan City* and *Pend Oreille* was based on the effect of the governing statutory scheme and did not rely on a preemptive regulation. Thus, the holdings in *Morgan City* and *Pend Oreille* implicitly suggest that a preemptive regulation with the force of law is not necessary for a finding of implied preemption. But the need for a regulation *vel non* does not appear to have been raised in either case, and neither court addressed the issue. And in any event, this Court's decision in *Geier*, 529 U.S. at 885, makes clear that a federal regulation can preempt state law but is not required in all instances of implied preemption.

Morgan City and *Pend Oreille* also demonstrate that a sovereign's historic power of eminent domain is not absolute or immune to implied preemption by federal law.[6] In a general sense, those decisions are thus in ten-

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[5] Cf. *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 388-389 (1983) (if the federal government changes policy and announces that state rate regulation of rural power cooperatives is inconsistent with federal policy, "it would of course pre-empt" state action); *City of Stilwell* v. *Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1045 (10th Cir. 1996) (REAct did not preempt condemnation, where facts and particular statutory provisions differed from those at issue in *Morgan City* and *Pend Oreille*, and federal government did not oppose condemnation).

[6] Similarly, *Hayfield N. R.R.* v. *Chicago & N. W. Transp. Co.*, 467 U.S. 622 (1984), confirms that a State's invocation of the power of eminent domain does not preclude a finding of preemption. While holding

sion with the result and reasoning of the decision below. See Pet. App. 16a-17a. But because the preemption inquiry is necessarily statute-specific, there is also no direct conflict between *Morgan City* and *Pend Oreille* and the decision in this case.

b. The Evergreen Terrace tenants further contend that the circuits are divided on whether the voluntary nature of participation in a federal program is relevant to the preemption inquiry. 09-445 Pet. 25-26 (citing *Morgan City*, 31 F.3d at 324; *Pend Oreille*, 417 F.2d at 202-203; and *Forest Park II* v. *Hadley*, 336 F.3d 724 (8th Cir. 2003) (*Forest Park*)). There is no direct conflict among the circuits on that issue.

It is true that, although participation in the federal rural electrification program is not compulsory, the courts in *Morgan City* and *Pend Oreille* held that federal law preempted the proposed condemnation of cooperative utility property financed under the REAct. And in *Forest Park II*, 336 F.3d at 731-734, the court held that a state law that effectively prevented the owner of federally subsidized housing from voluntarily withdrawing from the particular housing program was preempted because it interfered with the framework established by Congress. Thus, the voluntary nature of the federal programs at issue in all three cases did not preclude a finding of preemption. Nonetheless, because those decisions did not address that factor, they do not squarely conflict with the position articulated in the decision below.

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that there was no preemption of the use of state eminent domain authority to condemn a segment of railroad track that had been abandoned pursuant to federal law, *id.* at 637, the Court reached that conclusion only after thorough consideration of implied preemption arguments.

c. New West argues that review of the court of appeals preemption ruling is warranted because the court failed to address the fact that "Congress *expressly* delegated to HUD the power to decide whether and how Evergreen Terrace should be preserved as affordable housing for the next 30 years." 09-435 Pet. 20. According to New West, HUD's determination in that regard is entitled to deference because the agency was "acting within the scope of its congressionally delegated authority." *Id.* at 21 (quoting *New York* v. *FERC*, 535 U.S. 1, 18 (2002)).

New West's argument, however, is misplaced. As the Court explained in *New York*, 535 U.S. at 17, whether Congress has delegated to a federal agency the authority to displace state action is a "quite different legal question[]" from whether state law conflicts with federal law. This case involves only the latter question. Delegation can arise as an issue when an agency has promulgated a regulation or rendered a decision expressing an intent to preempt state law and that determination is challenged as beyond the scope of the agency's statutory authority. See, *e.g.*, *City of New York* v. *FCC*, 486 U.S. 57 (1988). There is no such regulation or order in this case.

B. The portion of the decision below rejecting New West's argument that the Property Clause prevents the City from exercising its eminent domain power over Evergreen Terrace also does not warrant review. See 09-435 Pet. 25-28. The court recognized that HUD has an interest as "a secured creditor" of New West, but it found no basis for concluding that the Property Clause "treats a federal loan as immunizing the borrower from state regulation (including eminent domain) on the the-

ory that the state is 'really' regulating the federal interest as a lender." Pet. App. 18a.

The federal government's property interest in Evergreen Terrace is more significant than the court of appeals' discussion suggests. The Property Clause of the Constitution (Art. IV, § 3, Cl. 2) gives Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." This Court has interpreted Congress's power concerning "other Property" expansively to include the "regulation of all other personal and real property rightfully belonging to the United States." *Ashwander* v. *TVA*, 297 U.S. 288, 331 (1936) (citation omitted). See generally *Kleppe* v. *New Mexico*, 426 U.S. 529, 538-541 (1976) (Property Clause power reaches beyond territorial limits). The interests of the United States, first as mortgage-insurer and then as mortgage-holder for Evergreen Terrace, are therefore property interests within the meaning of the Property Clause.

In *California Coastal Commission* v. *Granite Rock Co.*, 480 U.S. 572 (1987), however, this Court explained that "'the State is free to enforce its criminal and civil laws' on federal land so long as those laws do not conflict with federal law. The Property Clause itself does not automatically conflict with all state regulation of federal land." *Id.* at 580 (citing *Kleppe*, 426 U.S. at 543). The Court therefore concluded that, despite Congress's "plenary power" over federal property, "even within the sphere of the Property Clause, state law is pre-empted only when it conflicts with the operation or objectives of federal law, or when Congress 'evidences an intent to occupy a given field.'" *Id.* at 593 (citation omitted). Thus, a Property Clause issue ultimately requires con-

sideration of the same factors that apply to preemption under the relevant federal statutes. The Property Clause does not provide an independent defense to the City's proposed condemnation of Evergreen Terrace.

In any event, no other court of appeals has had occasion to address the effect of the Property Clause on the proposed condemnation of federally subsidized low-income housing. Further review of that issue is accordingly not warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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